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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,
v.
HELENE GLENMORE, CELIA SCHREIBER, DOROTHY HENESSY, MARTIN KOLBRENER, ISADORE BLAU,
and
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
No. .....

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,
v.
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT
Misc. No. 813

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February 29, 1960.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT.

Tri-Continental Financial Corporation (Tri-Continental), a Maryland corporation, prays that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Second Circuit on January 29, 1960, or in the alternative that this Court grant petitioner's

motion for leave to file a petition for a writ of mandamus or other appropriate writ to the Court of Appeals for the Second Circuit.

The Court of Appeals reversed a judgment rendered by the United States District Court for the Southern District of New York (John F. X. McGohey, J.) on February 17, 1959 in the course of a derivative and class action brought by stockholders of The New York, New Haven and Hartford Railroad Company (New Haven).

Opinions Below.

The opinion of the District Court is printed as Appendix A hereto and is reported *sub nom. United States* v. *New York, N.H.&H.R.R.* at 170 F. Supp. 562.

The opinion of the Court of Appeals in this case (R. 24-48) is printed as Appendix B hereto. The court refers therein for an explanation of certain parts of its judgment to its opinion of November 2, 1959 in the case of the *United States* v. *New York N.H.&H.R.R.*, Court of Appeals for the Second Circuit, Docket No. 25793 (herein referred to as the "Government case"). The latter opinion and the court's memorandum order of December 2, 1959, denying rehearing in that case, appear as Appendix C hereto. None of the opinions of the Court of Appeals has, as yet, been reported.

Jurisdiction.

The judgment of the Court of Appeals was dated and entered on January 29, 1960. (R. 49). Petitioner did not seek a rehearing in the court below. The jurisdiction of this Court to issue a writ of certiorari to the Court of Appeals is invoked under 28 U. S. C. §1254(1) (1958).

The jurisdiction of this Court to issue a writ of mandamus or other appropriate writ to the Court of Appeals is invoked under 28 U. S. C. §1651(a) (1958).

Questions Presented.

The sixth cause of action (the "Sixth Count") pleaded in this case involves the contention that certain agreements entered into between the New Haven and Tri-Continental, on behalf of itself and others ("the Banking Group") are void as an issuance of securities in violation of §20a of the Interstate Commerce Act, prior approval of the Interstate Commerce Commission not having been obtained. The complaint filed by the United States in the Government case against the New Haven and the Banking Group in the same court raised the same contention.

After summary judgment dismissing the Sixth Count had been granted in favor of Tri-Continental in the District Court, plaintiffs filed notice of appeal to the Court of Appeals for the Second Circuit. Tri-Continental moved, on the basis of an affidavit of counsel, to dismiss the appeal on the ground that the District Court's order was not appealable. An affidavit of counsel in opposition to the motion to dismiss was also filed. No further record was filed in this case.

In the meantime, an appeal from a summary judgment dismissing the complaint of the United States in the Government case was decided by the Court of Appeals. Finally, after suggestion to the Court of Appeals that the appeal to it in the Government case was improperly taken in view of the Expediting Act, and after further briefing, the Court of Appeals denied the motion to dismiss the appeal in this case, reversed the judgment of the District Court, and directed the entry of final judgment in favor of plaintiffs in this case.

The questions here presented include procedural and substantive matters of broad interest and importance. These are:

1. Whether a Court of Appeals may reverse a judgment of a District Court and render its own judgment in favor of appellant on the merits when only a motion to dismiss the appeal and an affidavit in opposition to such motion is before it;

2. Whether an order denying a plaintiff partial summary judgment on one of seven "counts" of a complaint which seek injunctive relief against the same transaction on different legal theories, and dismissing that "count" as to one of many defendants, is appealable under 28 U. S. C. §1292(a)(1) (1958) as the refusal of an injunction; and

3. Whether the agreements giving the Banking Group the option to require the New Haven to purchase some of its preferred stock constitute an issuance of "securities" within the meaning of §20a(2) of the Interstate Commerce Act.

Statutes Involved.

The statutes involved are 28 U. S. C. §1292(a)(1) (1958) and subsections (2) and (11) of §20a of the Interstate Commerce Act, 41 Stat. 494 (1920), as amended, 49 U. S. C. §20a (1958), which are printed in full in Appendix D hereto.

Statement of the Case.

Tri-Continental notes, at the outset, its contentions that the Court of Appeals did not have before it in this case a record sufficient to support any final judgment on the merits and that, by rendering such judgment, it "so far departed from the accepted and usual course of judicial proceedings

• • • as to call for an exercise of this court's power of supervision," SUPREME COURT RULE 19(b).

From the opinion of the Court of Appeals, it is abundantly clear, however, that it considered matters *de hors* the record, which consisted merely of affidavits of counsel.

Whether petitioner may now obtain review by this Court by means of certiorari of the Court of Appeals' decision on the merits is not clear, in view of the state of the record in the Court of Appeals. See STERN AND GROSSMAN, SUPREME COURT PRACTICE 13 (2d ed. 1954). Accordingly, petitioner has moved in the alternative for leave to file a petition for a writ of mandamus or other appropriate writ.

A. The Substantive Background[1].

The litigation which this petition brings to this Court is an aftermath of the devastating floods and hurricanes which ripped through New England in August and October, 1955, causing, among other havoc, multimilliondollar damage to the equipment and main and branch line rights-of-way of the New Haven Railroad. To make the necessary repairs, the New Haven negotiated a Government-guaranteed loan of $10,000,000 from a syndicate headed by the Chase Manhattan Bank (App. A, p. A-3, 170 F. Supp. at 563; App. C, p. C-3).

The loan could not, however, immediately be consummated since the provisions of the New Haven's charter enabled a minority group (the "Dumaine interests") holding about 27% of the carrier's preferred stock to block the loan, and the Dumaine group was prepared to do so unless the New Haven's management granted concessions which

[1] Because of the uncertain state of the record, this summary of the facts is based on the findings of the District Court, and many supporting references are to its opinion and to the opinions of the Court of Appeals.

such management was unwilling to recommend to the common shareholders. (App. A, p. A-4, 170 F. Supp. at 564; App. C, p. C-3).

To overcome this hurdle, the New Haven and Tri-Continental negotiated, on November 10, 1955, the agreement which is at the heart of this case. Tri-Continental, on behalf of itself and the Banking Group, agreed to buy out the Dumaine interests, and the Banking Group did so a week later, purchasing 131,385 preferred shares for $60 a share, the approximate market price on the New York Stock Exchange.

The New Haven and Tri-Continental further agreed that the Banking Group would hold the shares and that during the one-month period between November 18 and December 17, 1957, the bankers could have the right to sell or "put" the stock to the New Haven at $70 a share and the railroad would have the reciprocal right to buy or "call" for the shares at the same price. (App. A, p. A-4, 170 F. Supp. at 564; App. C, pp. C-4-C-6).

Thus, the transaction was in essence a banking transaction whereby the Banking Group made its capital, to the extent of approximately $7,800,000, available to the New Haven to enable the New Haven to accomplish its objective of removing the Dumaine block of stock as an obstacle to obtaining the flood loans. The Banking Group, in turn, was to be compensated for this use of its capital by recovering a banking profit which, by the agreement, was at once guaranteed and limited.

Subsequently, in April, 1956, as a condition of a further Government-guaranteed, ICC-approved loan by Chase Manhattan, Tri-Continental and New Haven agreed to defer the "put" dates to November 18-December 17, 1959, to accelerate the "call" dates to a comparable period in 1956, and to

raise the option price to $75 a share. (App. A, p. A-4, 170 F. Supp. at 564; App. C, p. C-5).

The New Haven kept the Interstate Commerce Commission fully informed of all of its transactions with Tri-Continental but did not seek the ICC's approval under Interstate Commerce Act §20a of either the original contract or the 1956 amendments. (App. A, pp. A-5-A-7, 170 F. Supp. at 564-65; App. C, pp. C-6, C-7).

B. The Litigation History.

1. In the District Court.

The original stockholders' complaint was filed on February 17, 1956. The action was consolidated with three other stockholder actions during the course of 1956, and a so-called Consolidated Amended Complaint was filed on June 11, 1957. This omnibus pleading, containing eleven "alternative counts" and naming 51 defendants, attacked a wide range of transactions carried out by the New Haven, by two of its wholly-owned subsidiaries, and by present and former directors and officers of the railroad.

In seven of the eleven "counts", plaintiffs included Tri-Continental among the defendants thereto, challenged the legality of the agreements of the New Haven granting the Banking Group the "put", and demanded a declaration of the agreements' invalidity, an injunction against their performance, and other relief.

The "Sixth Count", which has since gone to judgment in the Disfrict Court and Court of Appeals and is now here, named 25 defendants, at least nine of whom have appeared. It attacks the validity of the agreements on the ground that they required and did not receive ICC approval under §20a of the Interstate Commerce Act. (App. B, pp. B-17, B-18, B-21, B-22).

The "First Count" alleges that these same agreements violate certain statutes of Connecticut, one of the New Haven's states of incorporation.

The "Second Count" alleges that these agreements violate the legal obligations of corporate officers.

The "Fifth Count" alleges that the agreements violate the Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U. S. C. §§80a-1 — 80a-52. (1958).

The "Seventh Count" alleges that the agreements violate the New Haven's charter.

The "Eighth Count", framed as a class action, rather than as a derivative action, alleges once again, as does the "First Count", that the agreements violate Connecticut statutes.

The "Ninth Count", likewise framed as a class action, repeats the theory of the "Second Count" with respect to the same agreements. (R. 3).

As noted above, injunctive relief against performance of the agreements is sought in respect of each of such counts.

Once plaintiffs had filed their Consolidated Amended Complaint, the stockholders' action languished until the last weeks of 1958. Meanwhile, in November of that year, the Government case was begun in the District Court for the Southern District of New York, joining as defendants the New Haven and Tri-Continental and the remainder of the Banking Group. (App. C, p. C-7).

The Government's complaint charged that the agreements creating the "put" violated §20a of the Interstate Commerce Act, and sought a declaration of the agreements' invalidity and injunctive relief against their performance. The Government and the Banking Group thereupon cross-moved for judgment on the pleadings and/or summary judgment. (*Ibid.*).

The motions in the Government's case prompted new activity in this case. Plaintiffs moved on December 17, 1958 for a partial summary judgment against the New Haven and Tri-Continental on their "Sixth Count", and Tri-Continental cross moved for judgment on that "count". All motions in both cases came on for simultaneous hearing before Judge McGohey, and on February 17, 1959 he entered judgments based on an opinion (App. A) holding §20a inapplicable to the agreements in suit. He denied plaintiffs' motion in this case and entered judgment in favor of Tri-Continental dismissing the "Sixth Count". In his accompanying Memorandum and Order, Judge McGohey *sua sponte* made a certification pursuant to Rule 54(b) of the FEDERAL RULES OF CIVIL PROCEDURE (App. A, p. A-10, 170 F. Supp. at 567; R. 21, App. B., p. B-3).

2. In the Court of Appeals.

Plaintiffs in both cases appealed to the Court of Appeals for the Second Circuit. The stockholder plaintiffs in this case made no effort to docket a record, and on September 8, 1959, Tri-Continental moved to dismiss the appeal on the ground that Judge McGohey's judgment of February 17 was non-appealable (R. 1). The Court of Appeals received affidavits (R. 2-11) and heard the motion on October 5, 1959 (R. 21; App. B, p. B-4).

Meanwhile, the Government had docketed a record in its case, and its appeal came on for plenary hearing on the merits on October 6. A month later, on November 2, the Court of Appeals rendered an opinion (App. C, pp. C-1-C-19) reversing the judgment of the District Court, and on December 2 it denied the banking group's petition for rehearing (App. C, pp. C-20-C-22).

Thereafter, on December 17, counsel for the Banking Group in the Government case suggested to the Court of

Appeals that, in light of §2 of the Expediting Act, 32 Stat. 823 (1903), as amended, 49 U. S. C. §45, 15 U. S. C. §29 (1958), it had lacked jurisdiction to hear the Government's appeal. A day later the Court of Appeals requested counsel in both the Government case and in this case to submit answers to five questions which examined the validity of this jurisdictional suggestion and its implications for both actions. (R. 12-14).

Counsel filed their answers in early January, and on January 29 the Court of Appeals rendered judgment. In the Government case, it held unanimously that the Expediting Act precluded an appeal by the United States to that court (R. 21-40, 45; App. B, pp. B-4-B-16, B-21). It withdrew its judgment of November 2, but nevertheless directed the District Court to vacate and reenter its judgment in that action with the stated purpose of restoring the Government's right to appeal to this Court. The propriety of this action by the Court of Appeals is the subject of a separate application for review to this Court.

In this case, a divided court, Waterman, J., dissenting, held that the judgment entered by Judge McGohey against the stockholder plaintiffs was an appealable order under 28 U. S. C. §1292(a)(1). Thereupon, for reasons stated in its opinion of November 2, the Court of Appeals reversed that judgment and directed that judgment enter as prayed by plaintiffs. (R. 44, 49; App. B, p. B-20). Tri-Continental believes that both of these issues were, not only wrongly decided, but are of such importance as to require review in this Court.

REASONS FOR GRANTING THE WRIT.

I.

The decision of the court below on the merits on the state of the record before it constitutes such a departure from the usual course of judicial proceedings as to require review by this Court.

Petitioner's dilemma with respect to its rights of review by this Court of the merits is occasioned by the complete departure by the court below from the accepted and usual course of judicial proceedings. Unless the Court of Appeals' decision on the merits is vacated by this Court, petitioner's right to review here will be limited to review by extraordinary writ.

The complete record before the Court of Appeals, certified for use here by its clerk, shows that it consisted primarily of an affidavit of counsel in support of the motion to dismiss the appeal and an affidavit of counsel in opposition to such motion. On the basis of this record, the Court of Appeals directed the issuance of final judgment on the merits restraining enforcement of the agreements creating the "put." It is difficult to conceive of a clearer case calling for an exercise by this Court of its power of supervision over lower courts. The orderly administration of justice and the orderly safeguarding to parties of their rights to review by this Court require that the courts of appeals act solely on the basis of matters of record properly before them. In no other way can a party comply with the requirements of this Court relating to petitions for certiorari that there be certified and filed those portions of the record below "necessary for a consideration of the questions presented." See SUPREME COURT RULE 26(1); CYCLOPEDIA OF FEDERAL PROCEDURE §61.143 (3d ed. 1952).

II.

The decision of the court below holding Judge McGohey's judgment appealable under §1292(a)(1) conflicts with decisions of Courts of Appeal for the Third and Seventh Circuits.

The present case affords this Court a renewed opportunity to determine an important question of federal appellate practice, *viz.*, the applicability of 28 U. S. C. §1292(a)(1) to an attempted appeal from an order denying summary judgment on and dismissing a part of a complaint which states one of several legal theories to support injunctive relief against the same transaction.

It is a question which this Court was prepared to answer, in part, at least, a decade ago when a last-minute agreement of the parties removed the vehicle of decision from its calendar. *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 187 F. 2d 65 (7th Cir. 1950), *cert. granted*, 341 U. S. 930, *dismissed by stipulation*, 342 U. S. 802 (1951). It is a question as to which the passage of additional time has served only to multiply the variety of answers offered by the courts of appeal.

In the present case the Court of Appeals for the Second Circuit quite properly held that Judge McGohey's judgment of February 17, 1959 "plainly was not final even as to the transaction here challenged, since other theories of liability remained" (App. B., p. B-17). As a result, the trial court's attempted certification under FED. R. CIV. PROC. 54 (b) was ineffective. The appellate court nevertheless held, one Judge dissenting, that Judge McGohey's order was appealable "as an interlocutory order refusing an injunction under 28 U. S. C. §1292(a)(1)" (*ibid.*).

With the full realization that their judgment would be in direct conflict with decisions of the Third Circuit and

would open the doors of the courts of appeal to "repeated appeals from refusals of injunctions as to a single claim of wrong," (*id.* at p. B-19), the majority of the Second Circuit based its decision on an avowedly literalist construction of §1292(a)(1):

> "An order * * * dismissing a complaint for an injunction would seem to be the refusal of an injunction in the ordinary meaning of words; §1292(a)(1) applies to the refusal of final as well as temporary injunctions provided only that the order is 'interlocutory'; * * *" (App. B, p. B-17).

For supporting authority, the court below looked to certain of its earlier decisions holding that a dismissal of one of two related, but different, claims for injunctive relief was appealable under §1292 (a)(1), *Telechron, Inc.* v. *Parissi*, 197 F. 2d 757 (2d Cir. 1952), and that a denial of a plaintiff's motion for a summary judgment seeking injunctive relief was appealable under the same statute, *Federal Glass Co.* v. *Loshin*, 217 F. 2d 936 (2d Cir. 1954) (Clark, J., dissenting); *Raylite Electric Corp.* v. *Noma Electric Corp.*, 170 F. 2d 914 (2d Cir. 1948). The court relied on *Federal Glass* notwithstanding criticism of the holding with respect to appealability by a different panel in a later proceeding in that case. See *Federal Glass Co.* v. *Loshin*, 224 F. 2d 100 (2d Cir. 1955).

The present decision, in addition to revealing a conflict within the Second Circuit, is, as noted, in direct conflict with decisions of the Courts of Appeals for the Third and Seventh Circuits. These courts would, however, have denied appellate jurisdiction over Judge McGohey's order on completely different theories.[2]

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[2] The conclusion of the court below is, however, supported by a decision of the Fifth Circuit. *International Forwarding Co.* v. *Brewer*, 181 F. 2d 49 (5th Cir. 1950).

The Third Circuit has held repeatedly, in a long line of cases beginning with *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F. 2d 160 (1950), and continuing with *Albert* v. *School District*, 181 F. 2d 690 (3d Cir. 1950); *American Airlines, Inc.* v. *Forman*, 204 F. 2d 230 (3d Cir. 1953); and *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122 (3d Cir. 1954), that the test of plaintiff's right to appeal from an order of the type here involved is whether it has "a final and irreparable effect on the rights of the parties," *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545 (1949).[3]

As it said in *Albert* v. *School District, supra*, when it dismissed a school teacher's appeal from a denial of preliminary injunctive relief against a suspension in alleged violation of her Fourteenth Amendment rights:

> "The appeal at bar is an interlocutory one, and, under the circumstances of the instant case and for reasons which will be set out hereinafter what was stated in Morgenstern Chemical Co., Inc., *v.* Schering Corporation, 3 Cir., 181 F. 2d 160, is apposite. Judge Hastie said of the order in the Morgenstern case that it lacked '• • • the potential of drastic and far reaching effect on the rights of the parties which is characteristic of orders which decide the propriety of granting or refusing injunctions' " 181 F. 2d at 691.

This conclusion is clearly consistent with repeated statements of this Court concerning the proper scope and func-

[3] The obvious conflict between the Third Circuit's decision in *Morgenstern Chemical* and the Second Circuit's in the first *Federal Glass* case, *supra*, has attracted considerable scholarly comment—almost all of it critical of the position adopted by the Second Circuit in *Federal Glass* and reaffirmed in this case. See 68 HARV. L. REV. 1278 (1955); 103 U. PA. L. REV. 816 (1955); 7 STANFORD L. REV. 549 (1955); 39 MINN. L. REV. 921 (1955); 4 BUFFALO L. REV. 355 (1955).

tion of §1292(a)(1). According to this Court, §1292(a)(1) authorized departure from "finality as a condition of review * * * only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U. S. 323, 324-25 (1940). See also *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955); *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*.

The decision of Judge McGohey had no such "final and irreparable effect on the rights" of the stockholder plaintiffs as to justify an appeal within the standards laid down by this Court and followed by the Third Circuit. Their ultimate claim to have the agreements creating the "put" declared invalid and their performance enjoined was not denied in the District Court. They may yet obtain such relief if they can make out any one of their other theories said to justify it.

Also, the Seventh Circuit has held, see *Packard Motor Car Co.* v. *Gem Mfg. Co.*, *supra*, that where a plaintiff asserts multiple claims, let alone a single claim based on multiple theories of recovery, his right to appeal a dismissal of one of his claims is governed *in every case* by the requirements of FED. R. CIV. PROC. 54(b) and that in the absence of a valid certification under that Rule he cannot appeal under either §1291 or §1292(a)(1).

> "This language [of Rule 54(b)] is broad and appears to be all inclusive. And no reason is apparent why it is not equally applicable to both statutory provisions [§§1291, 1292(a)(1)]. Its purpose was to avoid piecemeal appeals so as to expedite rather than prolong litigation, and *we think that neither the purpose nor the desirability of the rule can be made to depend upon whether one or a multiplicity of claims relates to an injunction order.* To hold otherwise would place in the hands of litigants * * * the means

of thwarting the purpose of the rule by the inclusion among numerous other claims one for such an order." 187 F. 2d at 67 (emphasis supplied).

Moreover, the Second Circuit's decision seems in conflict with a number of its own decisions, *e.g.*, *Schwartz* v. *Eaton*, 264 F. 2d 195 (2d Cir. 1959); *John & Sal's Automotive Service* v. *Jones Beach State Parkway Authority*, 267 F. 2d 862 (1959), and decisions in other circuits, *e.g.*, *Brandt* v. *Renfield Importers, Ltd.*, 269 F. 2d 14 (8th Cir. 1959), in which dismissals of claims or denials of summary judgments for injunctive relief were held unappealable under §1291 and in which the courts never even considered the question of appealability under §1292(a)(1).

Such unarticulated decisions may or may not, as the majority argues in its opinion, weigh against the correctness of its decision in the present case. But they are a further persuasive indication of the widespread confusion and uncertainty which grips both the Bar and Bench in their efforts to determine the appropriate scope of the appellate jurisdiction conferred by §1292(a)(1).

Stripped of the policy-oriented limitations which the Third and Seventh Circuits have found embedded in §1292(a)(1), the present decision introduces a new construction of that statute which would throw open the doors of the courts of appeal wider than ever before.

It is a construction which should be ratified or, as we believe, rejected by a decision at the highest level which would clarify the applicability of §1292(a)(1) to trial-court orders entered in motions directed to the pleadings and in multiple-claim cases.

III.

The Court of Appeals' decision on the merits conflicts with the ICC's settled administrative construction of §20a of the Interstate Commerce Act and establishes an unworkable test for determining the applicability of that statute.

The decisions below constitute the first judicial constructions of the scope and meaning of §20a(2) of the Interstate Commerce Act.[4] This is not the sole reason requiring review by this Court. For while this case is one of first judicial impression, the Second Circuit arrived at its decision holding the agreements between Tri-Continental and New Hayen invalid by riding roughshod over the ICC's 40 years of settled construction of §20a(2). In the place of this settled construction, the court establishes an unworkable test of "economic effect" for determining the applicability of a statute of vital significance to the whole transportation industry and to the investment community which ministers to its vast financial needs.[5]

Moreover, the decision of the Second Circuit is a matter of widespread concern to banks, financial institutions and others who deal with utilities and other issuers of securities

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[4] Cases alleging carrier infractions of §20a(2) were here twice before, but both cases were decided on grounds which did not reach the interpretation of that subsection. *New York, C. & St. L. R. R.* v. *Frank*, 314 U. S. 360 (1941); *United States* v. *Chicago, N. S. & M. R. R.*, 288 U. S. 1 (1933).

[5] Not only common carriers by rail, but motor carriers, as well, are subject to regulation under §20a. See 49 Stat. 557 (1935), as amended, 49 U. S. C. §314 (1958). In addition, any determination of the reach of §20a affects the jurisdiction of the Securities Exchange Commission since §3(a)(6) of the Securities Act of 1933 exempts from the registration requirements of that statute "any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of Title 49," 48 Stat. 75, as amended, 15 U. S. C. §77c(a)(6)(1958).

subject to regulation. Many settled practices are disturbed by the broad language of the court, suggesting that every agreement by an issuer relating to its securities might constitute a "modification" of such securities.[6]

The agreements in suit and the mutual obligations of the New Haven and the banking group created by such agreements did not, in any sense, "modify" the terms of the preferred stock. Rather, the "put" and reciprocal "call" were intended to guarantee a banking profit and at the same time to impose an agreed and reasonable limitation on that profit. Other provisions of the agreements, such as those restricting transferability of the stock and those requiring the banking group to turn over to the New Haven any amounts received from a sale in excess of the "call" price, confirm the essentially banking nature of the transaction. The preferred stock stood in relation to the guaranteed banking profit essentially in the role of collateral.

Nevertheless, the Second Circuit, applying hindsight and a chancellor's foot test, held that the agreements constituted a modification of the preferred stock requiring ICC approval because:

> "clearly appellees' shares have changed under the highly practical tests of the marketplace.[7] We think

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[6] The significant bearing which decisions interpreting §20a have on the resolution of comparable questions arising under the Public Utility Holding Company Act of 1935, 49 Stat. 838, as amended, 15 U. S. C. §§79a-79z-6 (1958), has been noted by the Second Circuit, both in its opinion of November 2 in the Government case (see App. C., p. C-10) and in *SEC* v. *Associated Gas & Elec. Co.*, 99 F. 2d 795, 797, 798 (2d Cir. 1938). If the present decision is allowed to stand, it also seems inevitable that it will become precedental authority for cases arising under the other statutes administered by the SEC and the numerous state statutes regulating the financial arrangements of utilities.

[7] This presumably refers to the conceded fact that the market price of New Haven preferred dropped sharply under the impact of the recession of 1957-58 and is now selling well below the "put" price.

> it would indeed be 'to place form above substance and to defeat the statutory purpose' if . . . we were to say that an agreement having so great an economic effect did not modify the stock held by the appellees." (App. C, p. C-11).

This rationale, which would measure the extent of the ICC's regulatory jurisdiction under §20a by intangible "economic effect" and by undefined "tests of the marketplace", flatly contradicts a long line of ICC decisions in which the Commission has declined jurisdiction over transactions unaccompanied by the issuance of or actual changes in negotiable stocks, bonds, or notes, regardless of the transactions' financial significance. See, for example,

Western Maryland Ry. Stock, 295 I. C. C. 100 (1955) [stock warrants not within scope of §20a];

Davidson Transfer & Storage Co. First Mortgage, 282 I. C. C. 521 (1952) [Commission approval not required of loan to fund reacquisition of "securities" when loan unaccompanied by note or bond];

Gulf, M. & O. R. R. Purchase, Securities, 261 I. C. C. 405, 418 (1945) [contract to finance purchases assigned to bank held not a security];

Minneapolis & St. L. R. R. Reorganization, 244 I. C. C. 357, 366 (1941) [outstanding equipment obligations amounting to $1,030,900 are not securities after repayment of notes originally issued with the obligations];

Lehigh Valley R. R. Conditional Sales Contract, 233 I. C. C. 359 (1939) [conditional sales contract, unaccompanied by notes, not within §20a(2)];

Missouri Southern R. R. Bonds, 230 I. C. C. 39 (1938) [amendment of a mortgage does not constitute the issuance of securities];

Illinois Terminal R. R., 221 I. C. C. 676, 679 (1937) [approval not required for execution of a mortgage and pledge of properties and assets other than securities]; and,

Application of Louisiana Ry. & Navigation Co., 67 I.C.C. 808 (1921) [conditional sales contract, unaccompanied by notes, not within §20a(2)].

See also 73 I. C. C. ANN. REP. 170, filed Dec. 1, 1959, in which the Commission notes that a recent "open credit agreement * * * entered into by a motor carrier and over which the Commission had no jurisdiction involved loans up to 27.5 million dollars."

Because most of the foregoing cases involved debt and not equity[8] securities, the Second Circuit would brush off these precedents as mere dicta not to be relied upon by the financial community (App. C, p. C-13). The fact is that the financial community has relied on this unbroken chain of ICC decisions because neither these decisions, nor the text of §20a(2), admit of the implausible distinction between debt and equity securities. As the full Commission wrote in the landmark *Lehigh Valley* case, *supra*, which established once and for all, that §20a related only to negotiable securities:

> "One of the fundamental rules of construction is that the provisions of a statute must be considered as a whole. Another is that, where a statute is ambigu-

[8] Purchases by a carrier of its equity securities, and contracts to do so, have never been held by the ICC to require its approval. In its latest report to the Congress, the Commission also "recommend[ed] that §20a be amended to require the Commission's authorization for the acquisition by a carrier, directly, or indirectly, of any shares of its capital stock." 73 I. C. C. ANN. REP. 169 (1959). The agreements in suit were described by the ICC in 1956, *ante litem motam*, as a "contingent commitment [by the New Haven] to purchase shares of its preferred stock" *I. C. C. Finance Docket No. 19416* (1956) (quoted at App. A., p. A-7, 170 F. Supp. at 565).

ous, and susceptible of two constructions, it must be given the one which best comports with reason, justice, and convenience. Considering the provisions of section 20a as a whole, and giving effect to the second rule just mentioned it appears that the provisions were intended to apply to instruments negotiable or quasi-negotiable in character, such as are issued for the purpose of railroad financing." 233 I. C. C. at 365.[9]

The jurisdictional standards of "economic effect" and of the "marketplace" ordained by the Second Circuit's present decision are patently unworkable guides for investors who stand, as here, to lose millions of dollars on a wrong guess as to the ICC's jurisdiction.

As this case makes clear, they are jurisdictional criteria which must inevitably be applied retroactively in the light of facts occurring long after the consummation of the transaction they will be used to challenge. The "economic effect" of these agreements on the New Haven anticipated in 1955 was expected to be minor and favorable to the New Haven. Its stock was selling at 59¼ on November 10, 1955 and had risen to 65¼ by December 30. If the Second Circuit's jurisdictional tests are sustained, countless transactions, such as the one here, involving millions of dollars, which all parties concerned have long thought were beyond the scope of §20a, will be threatened. *Cf. New York, C. & St. L. R. R.* v. *Frank*, 314 U. S. 360 (1941).

Whether a decision which so contradicts the repeated decisions of the ICC and which lays open to such unsettling havoc the financial arrangements of so many carriers should be allowed to stand is a question which demands review by this Court.

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[9] The full Commission's decision in *Lehigh Valley* resolved a conflict of decisions between the Commission's Motor Carrier Division and Division 4, which has initial jurisdiction over railroad financing, as to whether conditional sales contracts fall within §20a.

There is yet another aspect of this case requiring review by this Court. It relates to the question of the extent to which parties in important matters may rely upon informal consultation with Government regulatory agencies. The District Court notes the following in its opinion with respect to such informal consultation:

> "... what is most significant here is that it [the making of the agreements] was promptly disclosed to officials of the Commission and to the Commission itself.
>
> "Among the documents submitted on the motions and considered by me, were the affidavit of William T. Griffin, Esq., Special Counsel to New Haven, and the Commission's 'reply' thereto. Neither controverts the other and neither has been controverted in any respect by the other parties to the suits. Accordingly the facts alleged in each are taken as conceded by all parties in both suits. Those facts are as follows. [footnotes omitted]
>
> "On November 29, 1955, at the Commission's office in Washington, D. C., Mr. Griffin [counsel for New Haven] and New Haven's treasurer conferred concerning the first loan [to the New Haven] with Commissioner J. Monroe Johnson, then chairman of the Commission's Division 4 which has jurisdiction over matters arising under Section 20a, and Mr. Roger T. Boyden, then Director of the Commission's Bureau of Finance which also has some subordinate jurisdiction over such matters. The making of the challenged agreement in the circumstances above described was fully disclosed to these Commission officials and copies of the agreement were given to them. They were informed, moreover, that New Haven's counsel was of the opinion that the agreement was not within the purview of Section 20a and that accordingly New Haven did not propose to apply for Commission approval pursuant to that section. The Commission thereafter authorized New Haven

to consummate the $10 million loan." (App. A, pp. A-5, A-6, 170 F. Supp. at 564-65).

The Court of Appeals was also very much concerned with the ICC's conduct in this case. That court recognized that the three-year delay by the Commission, after full disclosure to it of the agreements, was seriously prejudicial to the Banking Group, in view of the decline in the market value of the New Haven preferred stock. However, notwithstanding these considerations, the court refused to give any effect in its conclusion to the ICC's conduct. (App. C., p. C-15).

Informal consultation and clearance by persons dealing with administrative agencies is essential if the administrative process is to function properly. The effect of the Commission's inactivity for three years, despite full knowledge of the facts, is a matter this Court should determine. Compare *United States* v. *Chicago, N. S. & M. R. R.*, 288 U. S. 1 (1933), with *Baltimore & O. R. R.* v. *Jackson*, 353 U. S. 325 (1957).

Conclusion.

For the foregoing reasons, it is submitted that the writ should issue.

Respectfully submitted,

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63 Wall Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:

CAHILL, GORDON, REINDEL & OHL,
New York, New York,

BRUNDAGE & SHORT,
Chicago, Illinois.

February 29, 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

TRI-CONTINENTAL FINANCIAL CORPORATION, *Petitioner,* v. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, *Respondent.*	MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT Misc. No. _____

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR OTHER APPROPRIATE WRIT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner herein today filed with this Honorable Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit under 28 U. S. C. § 1254(1) (1958). In the event that said Petition for Certiorari is denied as an inappropriate method of reviewing in their entirety the procedural and substantive actions of the Court of Appeals, petitioner hereby files this motion for leave to file with this Court, in addition to or as an alternative to said Petition for Writ of Certiorari, said Petition as a petition for writ of mandamus or other appropriate writ.

The jurisdiction of this Court is invoked under 28 U. S. C. §1651(a) (1958).

Respectfully submitted,

MATHIAS F. CORREA,
63 Wall Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:

CAHILL, GORDON, REINDEL & OHL,
New York, New York,

BRUNDAGE & SHORT,
Chicago, Illinois.

February 29, 1960.

APPENDIX A.

APPENDIX A.

Opinion of District Court, Dated February 17, 1959.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, *v.* THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, TRI-CONTINENTAL FINANCIAL CORPORATION, A. C. ALLYN and COMPANY, INCORPORATED, AMERICAN TRANSPORTATION ENTERPRISES, INC., EQUITABLE SECURITIES CORPORATION, CARL M. LOEB, RHOADES & CO., THE ROBINSON-HUMPHREY COMPANY, INC., and JOHN W. CLARKE & CO., Defendants.	Civ. 140-42
HELENE GLENMORE, *et al.*, Plaintiffs, *v.* JOHN I. AHERN, *et al.*, Defendants.	Civ. 107-132

Appearances:

CAHILL, GORDON, REINDEL & OHL,
Attorneys for Defendants Tri-Continental Financial Corporation (in Civ. 140-42), A. C. Allyn and Company, Incorporated, American Transportation Enterprises, Inc., Equitable Securities Corporation, Carl M. Loeb, Rhoades & Co., The Robinson-Humphrey Company, Inc., John W. Clarke & Co., 63 Wall Street, New York 5, N. Y.

GEORGE COCHRAN DOUB,
Assistant Attorney General, Washington, D. C.

Opinion of District Court, Dated February 17, 1959.

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PERCIVAL E. JACKSON,
Attorney for Defendant Tri-Continental Financial Corporation in Civ. 107-132
68 William Street, New York 5, N. Y.

McGOHEY, D. J.

Opinion and Order.

Three motions in the Government's suit and two in the Glenmore suit are here considered. They are as follows.

In the Government's suit all defendants, other than New Haven, moved under Rule 12(b) for dismissal of the complaint on the ground that it fails to state a relievable Claim; or, in the alternative, for judgment on the pleadings under Rule 12(c). The Government cross moved, first for a preliminary injunction and later for summary judgment under Rule 56(a).

In the Glenmore suit the plaintiffs moved for partial summary judgment on the "sixth count" of their complaint. The defendant Tri-Continental Financial Corporation cross moved under Rule 12(c) for judgment on the pleadings on the "sixth count".

Matters outside the pleadings were offered in affidavits and considered. Accordingly the motions under Rule 12(b) and 12(c) have been considered as motions for summary judgment under Rule 56. The five motions were argued together.

All parties agree and I independently find that no genuine issue as to any material fact is raised on any of the motions. Decision of each turns solely on the following question of law: whether a written agreement entered

into in November, 1955 and amended in April, 1956, between New Haven and a group of bankers, in which New Haven made a contingent commitment to buy 131,385 of its preferred shares from the banking group in December, 1959, is illegal and void because it lacks prior authorization by the Commission pursuant to Section 20a of the Interstate Commerce Act.[1] For the reasons hereafter stated, I hold it is not.

The banking group consists of all the defendants, other than New Haven, named in the Government's suit. They acquired the shares by purchase from their then owners, of whom New Haven was not one, at or about the date of the challenged agreement, under circumstances hereafter related.

The Government suit seeks judgment declaring the agreement illegal and void for lack of compliance with Section 20a; and a permanent injunction restraining New Haven from carrying out or giving any effect to it. It also seeks to enjoin the members of the banking group *pendente lite* from assigning or transferring any of the shares which are subject to the challenged agreement except on order of the court.

The Glenmore suit is a derivative action by New Haven stockholders against a large number of defendants including the members of the banking group. The amended complaint is in multiple "counts" of which only the sixth is here involved. That "count" is based on the alleged illegality, for lack of compliance with Section 20a, of the agreement involved in the Government's suit.

The banking group acquired the shares and entered into the challenged agreement under the following circumstances. In the summer and early fall of 1955, New Haven's properties sustained extensive hurricane and flood damage which it was estimated would cost several million dollars to repair. A loan of $10 million, to be guaranteed by the Government, was negotiated but could not be consummated until

[1] 49 U. S. C. 20a.

authorized by the holders of the amount and class of stock required by New Haven's charter. The holders of 131,385 preferred shares, whose votes were required for approval of the proposed loan, opposed it except upon conditions which New Haven's management was unwilling to approve and recommend to the holders of the common stock. The management thereupon arranged with the banking group to purchase the 131,385 preferred shares at $60 per share. As part of this arrangement the challenged agreement was made with the banking group. The proposed loan was thereafter approved by New Haven's stockholders and, having been guaranteed by the Government, was consummated. In 1956 an additional Government guaranteed loan of $6 million was made. Both loans, upon New Haven's application, were authorized by the Commission.

The challenged agreement originally provided that the banking group had the right to call upon New Haven, in December, 1957, to buy all the shares at $70 per share; and New Haven had the right to call upon the banking group, in December, 1957, to sell all the shares to New Haven at the same price. The 1956 amendment extended the terminal date to December, 1959 and increased the price to $75 per share. During the life of the agreement the banking group may not sell any of the shares to others without giving New Haven opportunity to buy at the price offered by others. And if any shares are sold to others at a price higher than $75 per share, the banking group is obligated to pay the excess to New Haven.

The statute makes "unlawful" the issuance by a carrier of "any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission . . . the Commission by order authorizes such [issuance]." It is conceded that New Haven made no application for authority to enter into the challenged agreement; and that the Commission made no order authorizing it to do so. However,

there was no secret about the making of the agreement. It was, of course, disclosed to New Haven's stockholders in notices and financial statements; and to the Secretary of the Treasury who, on behalf of the United States, guaranteed both loans. But what is most significant here is that it was promptly disclosed to officials of the Commission and to the Commission itself.

Among the documents submitted on the motions and considered by me, were the affidavit of William T. Griffin, Esq., Special Counsel to New Haven, and the Commission's "reply" thereto.[2] Neither controverts the other and neither has been controverted in any respect by the other parties to the suits. Accordingly the facts alleged in each are taken as conceded by all parties in both suits.[3] Those facts are as follows.

On November 29, 1955, at the Commission's office in Washington, D.C., Mr. Griffin and New Haven's treasurer conferred concerning the first loan with Commissioner J. Monroe Johnson; then Chairman of the Commission's Division 4 which has jurisdiction over matters arising under Section 20a, and Mr. Roger T. Boyden, then Director of the Commission's Bureau of Finance which also has some subordinate jurisdiction over such matters. The making of the challenged agreement in the circumstances above described was fully disclosed to these Commission officials and copies of the agreement were given to them. They were informed, moreover, that New Haven's counsel was of the opinion that the agreement was not within the purview of Section 20a

[2] New Haven did not join in any of the present motions. The Griffin affidavit was offered to inform the Court of the facts alleged therein, for such weight as the Court might think appropriate. The Commission's "reply" is entitled "Certificate and Statement." Though not sworn to, it is signed by Harold D. McCoy in his official capacity as Secretary of the Commission, and under its seal. It has been accorded here the status of a statement under oath.

[3] See *United States Trust Co. of New York* v. *Sears*, 29 F. Supp. 643, 645.

and that accordingly New Haven did not propose to apply for Commission approval pursuant to that section. The Commission thereafter authorized New Haven to consummate the $10 million loan.

On March 13, 1956, the Commission issued a "press release" announcing that it "will institute an inquiry concerning [the challenged agreement] and certain accounting practices of the carrier to determine whether there has been any violation of the Commission's regulations or of the statutes administered by it, or any practices indulged in which are contrary to the best interests of the carrier or the public." The investigation was begun on March 19, 1956, by the Commission's Bureau of Accounts, Cost Finding and Valuation. How the investigation proceeded, what, if anything, it developed, when, if ever, it was concluded and what, if any, action the Commission took as a result of it, do not appear. Specifically, and significantly, it does not appear in any document before me nor was it contended in argument or briefs, that the instant Government suit was commenced pursuant to any order of the Commission, based on that or any other investigation, holding the challenged agreement invalid.[4]

The Commission's records disclose no Commission action "formal or informal" approving the challenged agreement or holding it exempt from Section 20a. On the other hand, there has not been produced and it is not contended that there exists any record disclosing any Commission action "formal or informal" disapproving the challenged agreement or holding it to be subject to Section 20a.

It does not appear whether in any report or order authorizing the 1955 loan, the Commission noted the existence of the challenged agreement. However, in its Report

[4] Although not alleged in any of the Government's papers, it is assumed the instant Government suit was commenced by the Attorney General and the United States Attorney for this district, only upon the Commission's request as required by the statute. 49 U. S. C. 12(1).

dated August 6, 1956, approving the second loan of $6 million, the Commission specifically noted that the consummation of that loan was a "condition precedent to the extension for two years of [New Haven's] contingent commitment to purchase certain shares of its preferred stock." The challenged agreement was further disclosed to the Commission in applications for authority to make other loans for other purposes; and also in annual reports filed with the Commission in 1956 and 1957.

It is not contended by any of the moving defendants that New Haven's disclosures to the Commission constituted an "application" under Section 20a for authority to make the challenged agreement; or that Commission "authorization" resulted from the Commission's failure to challenge the agreement at the times it approved the loans or indeed at any time prior to November 1958.[5]

Neither is it contended that the Commission's failure for three years to challenge the agreement, estops the Government from challenging it as illegal now. The moving defendants contend, rather, that the Commission's inaction for so long a time despite full knowledge of the facts, shows that the challenged agreement is not within the purview of Section 20a as construed and applied by the Commission since 1920 when the section was enacted. I agree.

Throughout the 38 years since the section was enacted the Commission has consistently construed and applied it as not governing agreements, regardless of the amount

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[5] The Commission's first attack on the challenged agreement was made in the instant complaint which was not filed until Nov. 17, 1958, three years after the agreement and the first loan were made and two and a half years after the agreement had been noted specifically by the Commission in its Report authorizing the second loan in 1956.

The Glenmore suit was filed on Feb. 17, 1956. The original complaint was in the usual form in stockholders' suits. It made no charge that the challenged agreement was illegal for lack of Commission approval under §20a. That charge was first made in the "sixth count" of the amended complaint filed on June 11, 1957.

involved, which do not also involve (a) the issuance of capital stock, promissory notes or bonds, or (b) the actual amendment of issued stock certificates, notes or bonds themselves.[6] The strictness with which the Commission has adhered to this construction is exemplified by its ruling in Fonda, Johnstown and Cloversville Railroad Company Bonds.[7] In that case the carrier made formal application under Section 20a for authority to do two things: *first*, to enter into an agreement with the trustee and bondholders under a corporate mortgage providing for a proposed amendment of the terms of the bonds as to interest; *second*, to amend the terms stated in each bond by stamping on each a "legend" reciting that the original interest rate of 4½% was reduced to 2%. The Commission took jurisdiction of the application for authority actually to alter the text of the bonds by stamping thereon the legend and granted authority to do so. It dismissed, however, that part of the application which sought authority to enter into the agreement, for the reason that, "the execution of the agreement providing for the proposed amendment . . . would not constitute an issue of securities coming within the limitations of Section 20a." The execution of the agreement here challenged clearly does not constitute an "issue" of any capital stock or notes or bonds any more than the agreement in the Fonda case. Moreover, here, the stock certificates themselves were not to be, and have not been, amended or altered in any respect. Accordingly the challenged agreement can be held illegal for lack of Commission approval, only by overruling the Commission's settled construction of Section 20a. Courts are

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[6] See, for example, *Application of Louisiana Railway and Navigation Co., etc.*, 67 I. C. C. 808; *Application of Grand Trunk and Western Railway Co., etc.*, 70 I. C. C. 554; *Lehigh Valley Railroad Co., etc.*, 233 I. C. C. 359. In the latter case, the full Commission sat. In its report it reviewed the earlier decisions and ruled in accordance with all but a single contrary ruling by a single division of the Commission. It thus, in effect, clearly rejected the latter.

[7] 180 I. C. C. 249.

not free to do this except for cogent reasons.[8] The Commission's silence and inaction for three years shows it found no such reasons, and nothing not before the Commission appears in the papers before me. It is well established that administrative interpretation of a statute long adhered to carries great weight.[9] And this is peculiarly so when, as here, the interpretation is based on "contemporaneous construction . . . by men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are untried and new."[10]

The failure to assert power "by those who presumably would be alert to exercise it . . . is equally significant in determining whether such power was actually conferred."[11] Not only has the Commission never asserted the power which is now claimed under Section 20a, but on the contrary it has expressly disclaimed the possession of such power, as its decisions show. Moreover, it has repeatedly asked Congress to enlarge its power under Section 20a to cover agreements like that in issue here which, though involving expenditures of large sums by a carrier, do not involve the "issuance" of its notes, bonds or stock.[12] Despite these repeated requests, Congress has not amended Section 20a. In these circumstances, the court will not, by a construction contradictory of the Commission's settled interpretation of

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[8] *U. S.* v. *Chicago North Shore Railroad Co.*, 288 U. S. 1, 13.

[9] *U. S.* v. *American Trucking Ass'ns.*, 310 U. S. 534, 549; *U. S.* v. *Chicago North Shore Railroad Co., supra.*

[10] *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315.

[11] *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352. See also *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513.

[12] See 51 I. C. C. Ann. Rep. 105 (1937); 57 I. C. C. Ann. Rep. 132-133 (1942-43); 58 I. C. C. Ann. Rep. 105 (1943-44); 66 I. C. C. Ann. Rep. 147 (1951-52); 67 I. C. C. Ann. Rep. 147 (1952-53); 68 I. C. C. Ann. Rep. 128 (1953-54); 69 I. C. C. Ann. Rep. 124 (1954-55).

the section, undertake to grant the Commission power which Congress has refused.[13]

It is clear from the foregoing that no grounds exist for granting the preliminary injunction sought in the Government's suit.

It is Ordered as follows:

(a) *In the Government's suit:*

(1) The motion for preliminary injunction is denied.

(2) The Government's motion for summary judgment in its favor is denied.

(3) Summary judgment in favor of the moving defendants dismissing the complaint is granted.

(b) *In the Glenmore suit:*

(1) The plaintiffs' motion for summary judgment in its favor on the "sixth count" of the complaint is denied.

(2) Summary judgment in favor of Tri-Continental Financial Corporation dismissing the "sixth count" of the complaint is granted.

Memorandum and Order

The order entered herein today granting summary judgment dismissing the "sixth count" of the complaint in the Glenmore suit, leaves undetermined the remaining "counts" pleaded in the complaint. There is, however, no just reason for delay in entering final judgment dismissing the "sixth count."

Accordingly, entry of such judgment is herewith ordered.

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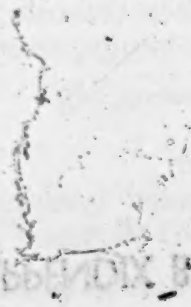
[13] *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 17; *U. S.* v. *Chicago North Shore Railroad, supra.*

APPENDIX B.



APPENDIX B.

Opinion of Court of Appeals, Dated January 29, 1960.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1959.

(Decided January 29, 1960.)

Docket Nos. 25793, 25879

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, TRI-CONTINENTAL FINANCIAL CORPORATION, A. C. ALLYN AND COMPANY, INCORPORATED, AMERICAN TRANSPORTATION ENTERPRISES, INC., EQUITABLE SECURITIES CORPORATION, CARL M. LOEB, RHOADES & CO., THE ROBINSON-HUMPHREY COMPANY, INC., and JOHN W. CLARKE & CO.,
Defendants-Appellees.

HELENE GLENMORE, *et al.*,
Plaintiffs-Appellants,

v.

JOHN I. AHERN, *et al.*,
Defendants-Appellees.

Before:

LUMBARD, Chief Judge,
WATERMAN and FRIENDLY, Circuit Judges.

Opinion of Court of Appeals, Dated January 29, 1960.

GEORGE COCHRAN DOUB, Assistant Attorney General, Morton Hollander, and ROBERT W. GINNANE, Washington, D. C., for plaintiff-appellant, United States of America.

CAHILL, GORDON, REINDEL & OHL, New York, N. Y., for defendants-appellees Tri-Continental Financial Corporation, *et al.*

POMERANTZ, LEVY & HAUDEK, New York, N. Y., for plaintiffs-stockholders in Glenmore, *et al.* v. Ahern, *et al.*

WILLIAM T. GRIFFIN, New York, N. Y., for defendant-appellee, New York, New Haven & Hartford Railroad Company.

FRIENDLY, Circuit Judge:

This opinion deals primarily with questions of jurisdiction and procedure in Docket No. 25793, to which we shall refer as the government's suit, and in Docket No. 25879, to which we shall refer as the stockholders' suit. The substantive question in both suits is whether transactions between the New Haven and certain bankers, to whom we shall refer as "the banking group" or as "appellees," constituted an issuance of securities by the New Haven requiring approval by the Interstate Commerce Commission under §20a(2) of the Interstate Commerce Act, 49 U. S. C. §20a.

On November 2, 1959, we rendered our opinion in the government's suit, holding that the transactions did constitute such an issuance of securities and reversing the judgment of the District Court which had granted the banking group's and denied the government's motions for summary judgment. On December 2, 1959 we denied, in a short opinion, the banking group's petition for rehearing.

Opinion of Court of Appeals, Dated January 29, 1960.

On December 17, 1959, counsel for the banking group suggested to us that the government's appeal had been improperly taken to this Court since, as they believed, §2 of the Expediting Act of 1903, 32 Stat. 823, 49 U. S. C. §45, required that the appeal from the order of the District Court be taken directly to the Supreme Court. We immediately requested the parties to the government's suit and the stockholders' suit to file briefs on the problems thus raised as to the government's suit and also on certain questions as to the appeal in the stockholders' suit, and instructed the Clerk to defer issuance of the mandate in the former.

Our earlier opinion sets forth the facts and the proceedings in the government's suit. The stockholders' suit was brought in the District Court for the Southern District in 1957 against the New Haven, its then directors, some former directors, Tri-Continental Financial Corporation (a member of the banking group), and others. The complaint was in multiple counts and concerned many transactions. The sixth count set forth the same contracts between the New Haven and the banking group alleged in the government's suit and claimed, as does the government, that the transactions were void for lack of approval by the Interstate Commerce Commission under §20a(2). The prayer for relief asked among other things that the defendants be enjoined temporarily and permanently from performing the contracts. On February 17, 1959, in the same opinion in which he decided the motions in the government's suit, the District Judge denied a motion for summary judgment by the plaintiffs to grant, and granted a similar motion of Tri-Continental to dismiss, the sixth count of the complaint in the stockholders' suit. On the same day, acting *sua sponte*, the District Judge made a "Memorandum and Order" in the stockholders' suit. In this he stated that, although the grant of summary judgment dismissing the sixth count left the remaining counts undetermined, there was no just reason for delay in entering final judgment

dismissing the sixth count, Fed. R. Civ. Proc. 54(b); such judgment was entered. On March 17, 1959, the plaintiffs filed a notice appealing to us "from the judgment dated and entered herein February 17, 1959." On October 5, 1959, the day preceding the argument before us in the government's suit, Tri-Continental moved that we dismiss the appeal in the stockholders' suit; this motion has remained undetermined.

I. The Government's Suit

The government contends its appeal was properly taken to this Court. It says we must look to the Expediting Act as this appears in the Statutes at Large, rather than the version in 49 U. S. C. §§44 and 45; that, when we do this, we find that, so far as regards the Interstate Commerce Act, the Expediting Act is limited to suits by the United States to restrain violations of the Interstate Commerce Act as originally enacted in 1887 together with such amendments thereof as had "a like purpose"; and that the amendment to the Interstate Commerce Act, made by §20a, added by Transportation Act, 1920, ch. 91, §439, 41 Stat. 494, vesting the Interstate Commerce Commission with jurisdiction over the issuance of railroad securities, was not of "like purpose" with the 1887 Act which was concerned with unreasonable rates, discriminatory practices, and unreasonable preferences. The government argues also that the Expediting Act did not embrace every action brought by the United States to enforce the legislation specified therein but only a "suit in equity"; that the substitution of the words "in every civil action" for "in every suit in equity" in §2 by the Act of June 25, 1948, ch. 646, §17, 62 Stat. 989, should not be construed as altering this; that the government's action here was not a suit in equity but an action for a declaratory judgment; and that if the prayer for an injunction in the government's complaint were to be

an obstacle to our jurisdiction, the government should now be allowed to abandon this. It says that even if we should disagree with both these contentions, we are not compelled to set our judgment aside and ought not do so. Finally, the government urges that if none of these contentions should prevail and we should vacate our judgment of reversal, we should also vacate the judgment of the District Court so that the District Judge may enter a fresh judgment from which the government may take an appeal directly to the Supreme Court.

As might be expected, appellees deny that the appeal was properly taken here and contend that we have no alternative to vacating our judgment for lack of jurisdiction. They insist also that if we do this, we lack power to vacate the judgment of the District Court; that this must stand, since the time for taking an appeal to the Supreme Court has long since expired; and that it would operate as *res judicata* in the stockholders' suit.

(1) One of the few points not disputed is that the construction of §2 of the Expediting Act must be determined on the text in the Statutes at Large rather than in the Code. *Stephan* v. *United States*, 319 U. S. 423, 426 (1943); *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373, 379-380 (1958). For understanding of the government's argument it is essential to consider the full text of the Expediting Act of 1903, ch. 544, 32 Stat. 823; this we set forth in the margin.[1] The acts referred to are the Sherman Act of

[1] CHAP. 544.—An Act To expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity pending or hereafter brought in any circuit court of the

1890, the Interstate Commerce Act of 1887, both without reference to any amendment, and "any other acts having like purpose that hereafter may be enacted."

United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

SEC. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the Circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

Approved, February 11, 1903.

Section 17 of the Act of June 25, 1948, ch. 646, 62 Stat. 989, amended Section 2 to read as follows:

Sec. 2. In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

In none of the several amendments to the Expediting Act, the last as recent as 1948,[2] did Congress broaden the reference to the Act of 1887 so as to refer to that Act as amended.[3] Therefore, argues the government, when a suit brought by the United States relates to any provision added to the Interstate Commerce Act of 1887, the suit is within the Expediting Act if, but only if, the added provision was of "like purpose," and regulation of the issuance of railway securities is not of "like purpose" with the Interstate Commerce Act and the Sherman Act as these stood in 1903.

It has been stated that "the general rule unquestionably is that, when a statute refers to and adopts an existing law, its purport is confined to the law as it then exists, and does not embrace or include any subsequent modification of it." *Postal Telegraph Cable Co.* v. *Southern Railway Co.*, 89 Fed. 190, 194 (W. D. N. C. 1898) *appeal dismissed*, 93 Fed. 393 (4th Cir. 1899), aff'd 179 U. S. 641 (1901). See *Kendall* v. *United States*, 12 Peters 524, 625 (1838). For many years Congress has used words like "as amended" to make clear an intention to refer not only to an act as originally passed but also to the act as amended. See, e.g., 12 U. S. C. §665, 12 U. S. C. §773, Civil Aeronautics Act of 1938, 52 Stat. 973, 1027, §1107, Labor-Management Relations Act, 1947, ch. 120, §207(c) and 208(c), 61 Stat. 155. Moreover, and more significant, precedents show full awareness by Congress of language suitable to make an intention to include not only existing but future amendments entirely plain. See, e.g., 12 U. S. C. §1040, 12 U. S. C. §1150a, 12

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[2] These include the Act of February 19, 1903, 32 Stat. 847; the Act of June 25, 1910, ch. 428, 36 Stat. 854; the Act of June 25, 1934, ch. 652 §401(d), 48 Stat. 1092; the Act of April 6, 1942, ch. 210, 56 Stat. 198-199; the Act of June 9, 1944, ch. 239, 58 Stat. 272; and the Act of June 25, 1948, ch. 646, 62 Stat. 989.

[3] As shown below, the Hepburn Act of June 29, 1906, 34 Stat. 592, had the effect of broadening the scope of the Expediting Act, for a brief period, to include Acts amending the Act of 1887.

U. S. C. §1431(i), 15 U. S. C. §77ccc(17), (18), Labor-Management Relations Act, 1947, ch. 120, §212, 61 Stat. 156.

When we turn from these general considerations to the specifics concerning application of the Expediting Act to the Interstate Commerce Act, perplexities abound. The first consideration in point of time favors appellees. In 1903, the Interstate Commerce Act of 1887 had itself been thrice amended, by the Act of March 2, 1889, ch. 382, 25 Stat. 855, the Act of February 10, 1891, ch. 128, 26 Stat. 743, and the Act of February 8, 1895, ch. 61, 28 Stat. 643; it is difficult to believe that Congress' failure to insert the words "as amended" in the Expediting Act manifested an intention that, in each case brought by the United States to enforce one of the sections of the 1887 Act thus amended, the Court would have to determine whether or not the amendment was of "like purpose" with the original Act. We come then to history that weighs for the government. Eight days after approval of the Expediting Act, the Elkins Act of February 19, 1903, ch. 708, 32 Stat. 847, was approved. It included, in §3, a specific provision making the Expediting Act applicable to suits brought for its enforcement. That fact alone is inconclusive, for the Elkins Act was not an amendment of the Interstate Commerce Act and, though it would seem rather clearly to have been of "like purpose," Congress might have wished to place the question beyond all doubt. However, §1 of the Elkins Act contains the phrase "under the provisions of the Act to regulate commerce or Acts amendatory thereto," thereby demonstrating that this method of cross-reference was well-known to Congress at the time when and in the context with which we are here concerned.

The government could find further support in another statute of the same month. The Act of February 25, 1903, ch. 755, 32 Stat. 903 contains an appropriation "for the enforcement of the provisions of the Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory

thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto." Since the Sherman Act had not then been amended, the reference to "Acts amendatory thereof" must be to future amendments; the same words with respect to the Act of 1887 must have the same meaning; and the contrast with the Expediting Act, approved only three weeks before, is striking. Nor can this contrast be dismissed on the ground that the Act of February 25, 1903 was an appropriations act where the precise text may not have been thoroughly considered. For the very section here discussed also contained the provision granting immunity from prosecution for any matter concerning which a person might testify or produce evidence "in any proceedings, suit, or prosecution under said Acts."

Still more support to the government's contention is furnished by §5 of the Hepburn Act of 1906, ch. 3591, 34 Stat. 548, 592. This made the Expediting Act applicable to any suit to enjoin any order or requirement of the Commission and also "to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to Regulate Commerce approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto." The Act of June 18, 1910, ch. 309, 36 Stat. 539, 554, creating the Commerce Court, removed the quoted clause, and, when the Urgent Deficiencies Act of 1913, ch. 32, 38 Stat. 208, 219, abolished the Commerce Court and provided that suits to enjoin orders of the Commission should be heard by three-judge courts, the Hepburn expansion of the scope of the Expediting Act was not restored. Nevertheless the Hepburn history gives added significance to the failure of Congress, when amending the Interstate Commerce Act by Transportation Act, 1920, ch. 91, 41 Stat. 456, 474, to expand

the Expediting Act to include suits in equity to enforce acts amendatory to the Interstate Commerce Act.

The government may draw further support from certain anomalies that seem to result from construing the Expediting Act to apply to all the provisions added by the Transportation Act. We shall mention one. Section 1(20) added to the Interstate Commerce Act in 1920 provides that railroad construction, operation or abandonment contrary to the provisions of that paragraph or of paragraphs (18) or (19) of §1 "may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest. * * *" If the Expediting Act applies to any suit by the government to enjoin violation of the Interstate Commerce Act as amended, there is a direct appeal to the Supreme Court if such a suit is brought by the United States, though appeal is to the Court of Appeals if the suit is brought by the Commission, as it was in *Piedmont & Northern Ry.* v. *Interstate Commerce Commission,* 286 U. S. 299 (1932).

When we move beyond 1920, we find considerations favoring appellees. In *United States* v. *Chicago, North Shore and Milwaukee R.R.*, 288 U. S. 1 (1933), the Supreme Court took jurisdiction of a direct appeal by the government from the refusal of a District Court to enjoin the issuance of securities, not authorized by the Commission, by an electric railroad which the government claimed not to be within the exception of §20a(1). Appellees overstate their case when they say the government is asking us to "overrule" that decision, since there the question of jurisdiction was not raised.[4] But the case nonetheless has its

[4] Mr. Justice Reed cites the *North Shore* case as one authority on jurisdiction in *Union Pacific R.R.* v. *United States*, 313 U. S. 450, 454, fn. 3 (1941). However, *Union Pacific*, a suit to enforce the Elkins Act, was clearly within the Expediting Act, the jurisdiction on direct appeal does not seem to have been contested, and nothing in the footnote reference affords a basis for inferring that the Court had given any further consideration to the jurisdictional question that might have been but was not raised in *North Shore*.

importance, especially since it was decided by a bench including two judges so sensitive to a question of jurisdiction as Justices Van Devanter and Brandeis. Another consideration favorable to appellees is furnished by §401(d) of the Communications Act of June 24, 1934, 48 Stat. 1064, 1092. The Transportation Act, 1920, had amended §1(1) of the Interstate Commerce Act to include within the scope of the Act common carriers engaged in the transmission of intelligence only by wire or wireless, although not all provisions of the Act were made applicable to them. By Title II of the Communications Act of 1934, Congress vested the regulation of such carriers in the Federal Communications Commission. This included not only the furnishing of service, the prevention of discrimination and preferences, and the reasonableness of rates, but also such matters as the construction or extension of lines, §214, and the keeping of uniform accounts, §220, no counterpart of which were in the original Interstate Commerce Act. Yet §401(d) of the Communications Act provided that the Expediting Act "shall be held to apply to any suit in equity arising under Title II of this Act wherein the United States is complainant," and we assume that "any" meant any. The construction urged by the government would thus give the Expediting Act a narrower role with respect to the rail carriers as to which it was originally enacted, than to communications carriers as to which it did not apply at all until 1920.

With the language inconclusive and the history thus Janus-faced, we resort to considerations of practicality. The basic purpose of §2 of the Expediting Act was "* * * to ensure expeditious disposition of suits in equity brought by the United States" and to eliminate the opportunities for delay which were then inherent in appeals to the Supreme Court by way of the Circuit Court of Appeals. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558 (1929). In order to be truly swift, a remedy must also be sure. We cannot believe that Congress meant to

confront litigants and the courts with the necessity of determining, in each case of an appeal in a suit in equity to restrain violation of the Interstate Commerce Act, as this has been amended, whether the provision sought to be enforced was or was not of "like purpose" with the Sherman Act or the Act of 1887. Even with respect to §20a that decision might not be quite so easy as the government claims, since, as indicated in our first opinion, p. 26, the purpose of railroad security regulation by the Commission was closely related to service and charges. The difficulties would be compounded under Part II of the Interstate Commerce Act dealing with motor carriers, Part III dealing with certain water carriers, and Part IV dealing with freight forwarders, since although certain regulation of these carriers is probably of "like purpose," no provision of these parts comes from the 1887 Act. And the problem would be aggravated by the repeal, by §13 of the Act of February 13, 1925, 43 Stat. 936, 941-42, of the Act of September 14, 1922, 42 Stat. 837, which had provided that if an appeal in a civil case had been taken to the Court of Appeals when it should have been taken to the Supreme Court or *vice versa*, the appeal should be transferred to the proper court. Although the question is by no means free from doubt, we therefore conclude that the Expediting Act applies generally to the Interstate Commerce Act as amended and not simply to provisions that have descended from the 1887 Act or have "like purpose." On this construction, meaning is given to the reference to "any other Acts having a like purpose" by interpreting that phrase to cover acts having a purpose similar to the Sherman Act or the original Interstate Commerce Act although not amendatory thereof. See, e.g., *United States* v. *DuPont & Co.*, 353 U. S. 586, 588 (1957), in which the Supreme Court entertained a direct appeal under §2 of the Expediting Act from a judgment "dismissing the Government's action brought in 1949 under §15 of the Clayton Act."

(2) The government next says that even though this be so, the Expediting Act would not have applied here prior to its 1948 amendment since the government's action was not a "suit in equity" but an action for a declaratory judgment, which has been said to be neither an action at law nor a suit in equity but *sui generis,* see, e.g., *United States Fidelity & Guaranty Co.* v. *Koch,* 102 F. 2d 288 (3d Cir. 1939), and that the 1948 amendment, made along with the general revision of the Judicial Code, which substituted "in every civil action" for "in every suit in equity," could not have been intended to effect a substantive change. On the latter point the government relies on the absence of any indication in the revisers' notes that a change was intended, *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U. S. 222, 227-28 (1957), and on the fact that a literal construction would result in making suits for money penalties, see, e.g., 49 U. S. C. §1(12), 17(a), (21), §6(10), and §16(8) and (9), and reparations actions by the government directly appealable to the Supreme Court, the latter in conflict with the views expressed in *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 442-43 (1949). We note also that although the United States Code, 49 U. S. C. §44, substitutes the words "in any civil action" for "in any suit in equity" in §1 of the Expediting Act, the reference, §32 of the Act of June 25, 1948, ch. 646, 62 Stat. 991, does not support this; and the cross-reference to the Expediting Act in the Federal Communications Act, 47 U. S. C. §401(d), escaped the change from "suit in equity" to "civil action" made in §2 of the former. We therefore agree that to construe the words "in every civil action" substituted in §2 of the Expediting Act as including actions for the payment of money would indeed be absurd literalism.

However, it does not follow that no effect whatever should be given to the amendment. Although an action by the government for a declaratory judgment that a transaction violates the Interstate Commerce Act might not

have been a "suit in equity," we think that such an action, especially when addressed to a transaction still executory, is sufficiently akin to such a suit to come within §2 of the Expediting Act as amended by the Act of 1948; and we leave to others the problem whether such an action would be within §1 or 47 U. S. C. §401(d). This conclusion follows *a fortiori* where, as here, the complaint included a prayer for an injunction. The distinction between such a complaint and the type of complaint exemplified by *Northern Pacific Ry.* v. *United States*, 356 U. S. 1 (1958), is too thin to warrant a difference in result.

We hold therefore that although both the government's arguments for the propriety of having taken its appeal to this Court rather than to the Supreme Court are substantial, we would not have decided the appeal if our appellate jurisdiction had been questioned before we rendered our judgment.

(3) Appellees say this ends the matter, since the question of appellate jurisdiction may be raised at any time. In support of this, they cite cases that have permitted the question to be raised on petition for rehearing. *Black and Yates* v. *Mahogany Association*, 129 F. 2d 227, 236-37 (3d Cir. 1941), *cert. denied*, 317 U. S. 672 (1942); *Cummings* v. *Redeeriaktieb Transatlantic*, 242 F. 2d 275, 276 (3d Cir. 1957). Here, however, the question was not raised until after a petition for rehearing had been denied and our judgment had become final. While it was entirely proper for appellees to suggest the question, as indeed it would have been for us to take note of it on our own motion, our holding that the government's appeal should have been taken directly to the Supreme Court does not lead automatically to a conclusion that our judgment is void.

If we had decided in favor of appealability on a motion to dismiss and had rendered judgment on the merits, although our judgment would have been subject to review and possible reversal on a timely application to the Supreme Court, we doubt that it would have been open to

collateral attack or that we would have been compelled to reopen it after the time for applying for rehearing had expired. Here, although appellate jurisdiction was not argued, the question was necessarily before us and, as recently said by Judge Pope in *Yanow* v. *Weyerhaeuser Steamship Company*, 28 U. S. L. Week 1076 (9th Cir. Nov. 12, 1959), "the reversal of the judgment below was a tacit determination of the court's jurisdiction and a final adjudication of that issue." (Slip opinion, p. 4) If there were no other way to preserve the right of the United States to Supreme Court review of the District Court's judgment, the time for appeal from which to the Supreme Court has expired, we might well be required to leave our judgment of reversal in effect, as the Ninth Circuit left its judgment in *Yanow*, with appellees having the right to apply for review on all questions, including our action in doing so. However, we need not decide that question, since we can preserve the right to direct review of the District Court's judgment granted the government by the Expediting Act without maintaining a judgment that we would not have rendered if our appellate jurisdiction had been seasonably questioned.

In a long line of decisions going back as far as *Gulley* v. *Interstate Natural Gas Co.*, 292 U. S. 16 (1934), where appeals were taken to the Supreme Court under §266 of the Judicial Code, now 28 U. S. C. §1253, from judgments of three-judge courts under circumstances held inappropriate for that procedure, although not obviously so, the Court has stated that it would "enforce the limitations of §266 by an order framed to save appellants their proper remedies," *Phillips* v. *United States*, 312 U. S. 246, 254 (1941). This was by vacating the decree under appeal and remanding "the cause to the court which heard the case so that it may enter a fresh decree from which the appellants may, if they wish, perfect a timely appeal to the circuit court of appeals." Appellees' attempt to distinguish these cases on the basis that they involved "a jurisdictional

defect in the Court below, rather than, as here, in the Appellate Court" ignores the clear holding of the Supreme Court that in such cases "the issue is not one of jurisdiction of the District Court as a federal court" and the defect was that the Supreme Court was "without jurisdiction to hear the merits of the appeal." *Wilentz v. Sovereign Camp*, 306 U. S. 573, 582 (1939). In *Healy* v. *Ratta*, after the Supreme Court had dismissed a direct appeal from a decree rendered by three judges, 289 U. S. 701 (1933), the Court of Appeals decided an appeal seasonably taken to it, 67 F. 2d 554 (1st Cir. 1933), and its judgment was subsequently reviewed by the Supreme Court on the merits, 292 U. S. 263 (1934). The propriety of the procedural course there taken was confirmed in *Phillips* v. *United States*, *supra*, at 254. If there be need of further proof of the existence of the power thus to vacate the judgment below where the sole defect is lack of appellate jurisdiction, the statement in *Columbia Gas Co.* v. *American Fuel Co.*, 322 U. S. 379, 384 (1944), would meet it. We know the Supreme Court has many powers that we do not; but we can see no basis for thinking that if the Supreme Court, with its limited direct appellate jurisdiction over the district courts, can vacate a district court judgment when an appeal was not properly before it, a court of appeals, which regularly reviews judgments of the district courts, cannot. *Cf. In re Cook's Motors*, 142 F. 2d 369 (1st Cir. 1947). To be sure, the court will do this only when the jurisdictional problem "had not been fully settled," *Rorick* v. *Commissioners*, 307 U. S. 208, 213 (1939); *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392 (1934). But we think this opinion settles that the jurisdictional problem here "had not been fully settled"—even though it may settle nothing else.

II. The Stockholders' Suit

We pass now to the appealability of the judgment dismissing the sixth count of the complaint in the stockholders'

suit. As to this, of course, §2 of the Expediting Act has no application, since that Act is limited to suits by the United States. The questions are whether the judgment is appealable under 28 U. S. C. §1291 as a final judgment by virtue of the certification under Fed. R. Civ. Proc. 54(b), or under 28 U. S. C. §1292(a) (1) as an interlocutory order refusing an injunction. The judgment plainly was not final ev[illegible] as to the transactions here challenged, since other theories of liability remained. *Schwartz* v. *Eaton*, 264 F. 2d 195 (2d Cir. 1959). However, we hold it was appealable as an interlocutory order refusing an injunction under §1292(a)(1).

The sixth count alleged the invalidity of the transactions here in issue for lack of Interstate Commerce Commission authorization. The prayer sought, *inter alia*, a judgment "enjoining temporarily and permanently the performance and enforcement of said contracts by the defendants." Judge McGohey's order of February 17, 1959, denied plaintiffs' motion for summary judgment on the sixth count and granted Tri-Continental's motion to dismiss that count. His "Memorandum and Order" of the same day directed the entry of judgment dismissing the sixth count and such judgment was entered. Despite the District Court's characterization of the judgment as final, it was in fact "interlocutory" not only as regards the entire litigation but even as to the particular transaction here at issue. An order, misnamed a "judgment," dismissing a complaint for an injunction would seem to be the refusal of an injunction in the ordinary meaning of words; §1292(a)(1) applies to the refusal of final as well as temporary injunctions, provided only that the order is "interlocutory," *Federal Glass Co.* v. *Loshin*, 217 F. 2d 936, 937 (2d Cir. 1954); and nothing turns on the fact that the notice of appeal spoke only of "the judgment dated and entered herein February 17, 1959" and did not refer also to the order denying plaintiffs' motion. 7 Moore, Federal Practice, ¶73.14, at 3166.

Appellees argue that the judgment was not appealable as an interlocutory order refusing an injunction under

§1292(a)(1) because, even as to the transactions here challenged, other grounds for the grant of an injunction remained undetermined. Decisions of this Court point against this. In *Raylite Electric Corporation* v. *Noma Electric Corporation*, 170 F. 2d 914 (2d Cir. 1948), and *Federal Glass Company* v. *Loshin*, *supra*, we held that, in a suit for an injunction, an order denying a motion of plaintiff for summary judgment was appealable under §1292(a)(1) although the plaintiff might later prevail upon a trial. The *Loshin* decision is all the more meaningful because of the thorough consideration on the part of Judges Learned Hand and Frank required by Judge Clark's strong dissent favoring the contrary view taken by the Third Circuit, *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F. 2d 160, 162 (1950). Despite what was said in the second decision in *Loshin*, 224 F. 2d 100, 101 (1955), *Raylite* and first *Loshin* must be taken as the law of this Circuit; and incongruity, if any there be, in the fact that reversal of the District Court's order, on an appeal upheld as from an "interlocutory" order under §1291(a)(1), would result in the grant of final relief, existed in *Raylite* and *Loshin* as fully as here. In fact the instant case, where a separate count, asserting a distinct legal theory, was dismissed solely on a matter of law, seems an *a fortiori* one, and *Telechron, Inc.* v. *Parissi*, 197 F. 2d 757 (2d Cir. 1952), supports appealability under §1292(a)(1). There, in an action for a declaratory judgment, plaintiffs sought an injunction in part on grounds relating to the patent laws and in part on grounds of unfair competition; the court held that an order striking the portions of the complaint relating to unfair competition was appealable under what is now §1292(a)(1), although plaintiff's claims for relief on grounds under the patent laws remained open.

Our decisions in *Studer* v. *Moore*, 153 F. 2d 902 (1946), *Porter* v. *American Distilling Co.*, 157 F. 2d 1012 (1946), *Schwartz* v. *Eaton*, *supra*, *John & Sal's Automotive Ser-*

vice v. *Jones Beach State Parkway Authority*, 267 F. 2d 862 (1959); and *Goldlawr* v. *Heiman*, December 29, 1959, cited in opposition to appealability, do not demand a different conclusion. In all those cases appellants sought to sustain appealability as from a final judgment under §1291; neither the briefs nor the opinions discussed appealability as from the refusal of an injunction under §1292(a)(1); and the problem in all save *Schwartz* v. *Eaton*, was the dismissal of some but not all of the defendants, which we have recently discussed in *Goldlawr* v. *Heiman*, *supra*.

We are fully aware that "Finality as a condition of review is an historic characteristic of federal appellate procedure," *Cobbledick* v. *United States*, 309 U. S. 323, 324 (1940), and of the important considerations of policy behind this. But 28 U. S. C. §1292 constitutes a departure from that policy and we would not be warranted in importing into its contruction considerations drawn from the very policy to which it is an exception. We doubt that upholding appealability in the unusual circumstances here presented will often lead to repeated appeals from refusals of injunctions as to a single claim of wrong. Cases like this, in which a plaintiff has presented to the lower court only one of several legal grounds for an injunction, will, we think, be exceedingly rare. For parties are more interested in victory in the court below than in the number of appearances they can make in the court above. We hold therefore that the appeal in the stockholders' suit is properly before us.

That appeal presents the identical issue involved in the government's suit. The two cases were heard together in the District Court. In the appeal in the government's suit we permitted the stockholders to submit an *amicus* brief and appellees to answer this in a reply brief. Here, as in *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, 184 F. 2d 66, 71-72 (2d Cir. 1950), *cert. denied*, 340 U. S. 941 (1951), nothing will be gained by a further argument and "an immediate decision on this issue may accelerate the

parties' access to the Supreme Court, if they are disposed to seek it." For the reasons fully set forth in our opinions in the government's suit, we reverse the judgment of the District Court in the stockholders' suit.

We therefore direct:

I. In the government's suit:

(1) That our judgment dated November 2, 1959 be vacated;

(2) That the judgment of the District Court dated July 10, 1959 be vacated for the sole purpose of enabling the District Judge to enter a fresh judgment from which the United States may, if so advised, take a direct appeal to the Supreme Court under 49 U. S. C. §45;

(3) That no costs be allowed on the appeal; and

(4) That the mandate issue five days after the filing of this opinion.

II. In the stockholders' suit:

(1) That the motion to dismiss the appeal be denied;

(2) That the judgment dismissing the sixth count of the complaint in the stockholders' suit be reversed, with costs, and that an injunction, containing the exception stated in our opinion of November 2, 1959, p. 34, shall issue; and

(3) That issuance of the mandate be stayed for 30 days pending the filing of a petition for certiorari and, if such a petition be filed within said period, until final determination thereon, such stay to be conditioned upon the filing within 10 days of a stipulation by Tri-Continental and the New Haven as set forth in said opinion, p. 34.

It is so ordered.

Opinion of Court of Appeals, Dated January 29, 1960.

WATERMAN, Circuit Judge, concurring in part and dissenting in part:

I concur with my brother panel members in the dismissal of No. 25793, the government suit, for lack of appellate jurisdiction and I concur in vacating the district court's judgment. I also concur with them in holding that the judgment order of Judge McGohey below in No. 25879, the stockholders' derivative action, was not a final judgment order, and therefore not appealable as such. I disagree with them, however, insofar as they hold that the order below dismissing the Sixth Count in No. 25879 is appealable under 28 U. S. C. 1292(a)(1) as an interlocutory order refusing an injunction; but I wish it to be clear, nevertheless, that if I believed the issue were properly before us for determination I would agree with them and join with them in their disposition of the case.

The stockholders' complaint contains various allegations of wrongdoing, i.e., contains multiple claims against various defendants. Not all the counts are joined in by the same plaintiffs or seek relief from the same defendants. In Counts 5, 6 and 7, however, there is complete identity of plaintiffs and defendants. The prayers for relief in the complaint include prayers for enjoining both temporarily[1] and permanently the performance and enforcement of certain contracts of the New Haven, one of which is the con-

[1] The question of whether a "temporary" injunction should issue was not before Judge McGohey at the time of the ruling sought to be appealed from. The stockholder plaintiffs moved for partial summary judgment on their sixth count, and if they had prevailed would have been entitled to a permanent injunction preventing performance of this one of the several contracts they were attacking. A cross-motion for summary judgment to dismiss the sixth count was filed by one of the 25 defendants. The cross-motion was granted as to that defendant. The stockholders' motion was denied. In this wise the sixth count was dismissed, and my colleagues hold this dismissal to be the refusal of an injunction. It does not appear how many of the defendants had been served at this time, but at least nine of the twenty-five were.

tract involved in No. 25793, the government action. Counts 5, 6 and 7 allege that this contract is a nullity and seek to enjoin its performance. No other contract is involved in these counts. The government action alleged this contract to be null and void because the New Haven had not obtained prior approval to enter into it from the Interstate Commerce Commission. Count 6 of the stockholders' suit alleges that the contract is void for the same reason.

The government suit in its entirety having come before the trial judge for disposition, Count 6 of the stockholders' suit was simultaneously disposed of also. No disposition was made of any of the other allegations in the stockholders' suit, not even of Counts 5 and 7, despite the fact that these Counts related to the same contract attacked in Count 6, involved the identical parties plaintiff and identical parties defendant; and prayed for identical relief. Count 5 seeks to nullify the contract and enjoin its performance on the ground that its making was, and its performance would be, violative of Section 17(a) of the Investment Company Act of 1940, 15 U. S. C. §80(a)-17(a). Count 7 seeks nullification and an injunction on the ground that the contract was made in violation of the charter provisions of the New Haven. Though I believe it well within his discretion for the trial judge to combine his consideration of the legal theory of recovery contained in Count 6 of the stockholders' suit with his adjudication of the validity of that theory in the Government's suit, I am of the opinion that the legal theories advanced by the stockholders in support of Counts 5 and 7 must also be resolved below before the question of whether this injunction was properly refused can become appealable.

It is my thought that we should not entertain an appeal under 1292(a)(1) until all the legal theories advanced to support or deny injunctive relief in connection with one claim of breach, or one claim of wrong, have been considered and adjudicated upon below. Otherwise we lay ourselves open to interlocutory appeals, piecemeal, first to review with

respect to a single claim one theory of recovery or defense, and then another, and then yet another, so long as prayers for injunctions are contained in the pleadings and the pleadings are ruled upon below at separate times. This would result in poor judicial administration, would be contrary to the long-standing practice and policy of the federal courts, and could not have been contemplated as within the purview of 1292(a)(1). For instance, here, because petitioners set forth three separate and distinct legal theories to support the issuance of an injunction to prevent performance of a contract we could be faced with three separate appeals from the grant or denial of that prayer; yet the single claim before the court is whether, as a matter of law, that contract is a nullity.

Although the majority reverses the action of the court below with respect to the one count, the sixth, and orders that a permanent injunction issue, we are unanimous in holding that the order below with reference to this one count (which order is interpreted by the majority as an order refusing an injunction) was not a final order so as to be appealable as such. We state the order was not final and was not appealable because all theories of defendants' liability were not disposed of below by the ruling.

The majority, however, grants prayers of final relief as a matter of law, though we all say we are not reversing a final order below denying relief. This final relief is granted by the taking of appellate jurisdiction over an order that we are unanimous in denominating an interlocutory, non-final order, and even though the court below did not adjudicate upon all theories of defendants' liability.

It is claimed that we may properly do this, despite the clear inconsistency of doing so, not only by literally interpreting the statute, 1292(a)(1), but also on the authority of our decisions in three cases cited in the majority opinion. I only point out that in the instant case we have at least three theories of liability with reference to one contract and that contract is one of several contracts attacked in the suit,

whereas a reading of the three cases relied upon will demonstrate that the portions of those cases permitted to be appealed dealt with quite different and broader problems of liability. In *Telechron*, which the majority particularly relies upon, the counts involved application of federal law on the one hand and state law on the other. The case of *Schwartz* v. *Eaton*, which the majority seeks to distinguish as not applicable here, was a case like this one, brought by stockholders, and a close reading of the opinion in that case appears to me to lend substantial support to the position I take.

By taking jurisdiction of this appeal under 28 U. S. C. 1292(a)(1) the majority creates opportunities for harassment and delay in suits such as this. Cf. *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176 at 179 ff.; *Schwartz* v. *Eaton*, 264 F. 2d 195 (2 Cir. 1959); *Armstrong-Norwalk* v. *Local No. 283*, 269 F. 2d 618, 621 (2 Cir. 1959); *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F. 2d 160, 162 (3 Cir. 1950).

I would grant the motion to dismiss the stockholders' appeal.

APPENDIX C.

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Opinion of Court of Appeals, Dated November 2, 1959.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 109—October Term, 1959.

(Argued October 6, 1959 Decided November 2, 1959.)

Docket No. 25793

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, TRI-CONTINENTAL FINANCIAL CORPORATION, A. C. ALLYN AND COMPANY, INCORPORATED, AMERICAN TRANSPORTATION ENTERPRISES, INC., EQUITABLE SECURITIES CORPORATION, CARL M. LOEB, RHODES & CO., THE ROBINSON-HUMPHREY COMPANY, INC., and JOHN W. CLARKE & CO.,

Defendants-Appellees.

Before:

LUMBARD, WATERMAN and FRIENDLY,

Circuit Judges.

Appeal by the United States from a judgment, John F. X. McGohey, *Judge*, in an action brought by the United States on behalf of the Interstate Commerce Commission, 49 U. S. C. §12(1), denying plaintiff's motions for summary

judgment and a preliminary injunction, granting defendants' motions which were treated as for summary judgment, and dismissing the complaint. The judgment is reversed and the District Court directed to enter a judgment granting plaintiff's motions and denying defendants' motions.

GEORGE COCHRAN DOUB, Assistant Attorney General, and Morton Hollander, Washington, D. C. (S. Hazard Gillespie, Jr., United States Attorney, New York, N. Y., Robert W. Ginnane, and Harvard R. Osmond, Washington, D. C. on the brief), for plaintiff-appellant.

MATHIAS F. CORREA, New York, N. Y. (James A. Fowler, Jr., J. Bernard Quigley, H. Richard Schumacher and Cahill, Gordon, Reindel & Ohl, New York, N. Y. on the brief), for defendants-appellees Tri-Continental Financial Corporation, et al.

JULIUS LEVY, New York, N. Y. (Irving Bizar and POMERANTZ LEVY & HAUDEK, New York, N. Y., on the brief), for plaintiffs-stockholders in Glenmore, et al. v. Ahern, et al., as amicus curiae.

WILLIAM T. GRIFFIN, New York, N. Y. submitted a brief for defendant-appellee, New York, New Haven & Hartford Railroad Company.

FRIENDLY, Circuit Judge:

The question here is whether a railroad subject to §20a of the Interstate Commerce Act, 49 U. S. C. §20a, can lawfully provide by agreement for significant changes in the rights and privileges of holders of 27% of its preferred stock without having obtained authorization from the Inter-

state Commerce Commission under §20a(2).[1] We hold it cannot.

The question arises as follows: In August and October, 1955, the New York, New Haven & Hartford Railroad Company sustained extensive hurricane and flood damage. In an effort to raise funds required for repairs the New Haven management sought a $10,000,000 bank loan, which was to be guaranteed by the United States pursuant to §302 of the Defense Production Act of 1950, 64 Stat. 798, 801, as amended, 50 U. S. C. App. §2092. The New Haven's charter required that such a loan be approved by the affirmative vote of two-thirds of the shares of its preferred stock considered as one class and of a majority of all the preferred and common shares considered as another. The management gave notice of a special meeting of the New Haven's stockholders to vote such approval.

After the notice was mailed, Amoskeag Company and the Dumaine family, owning 76,570 of the 491,540 shares of preferred, asked that the stockholders' approval be conditioned upon a proviso that the New Haven should not declare or pay any dividend on its common stock so long as the proposed loan remained unpaid. The New Haven's management then abandoned the proposed special meeting. It did this on the basis of a professed belief that Amoskeag,

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[1] This section, so far as material, provides:

"It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption."

the Dumaine family, and other holders of preferred who normally voted with them could block the needed two-thirds vote of the preferred if the proviso were not included and that the needed majority vote of the preferred and common considered as one class could not be attained if it were.

The New Haven management thereupon entered into negotiations with a banking group to have the latter acquire the preferred shares owned by Amoskeag, the Dumaine family and others allied with them. These negotiations led to an agreement, dated November 10, 1955, between the New Haven and Union Securities Corporation on behalf of the banking group. The agreement provided that the banking group would purchase from specified sellers not less than 120,000 nor more than 140,000 shares of New Haven preferred stock at a price ultimately fixed at $60 per share. The New Haven agreed that it would declare a $5 dividend for 1955 on the preferred not later than April 1, 1956, and that the purchasers should have the right to sell or, in the language of the market, to "put" to the New Haven on and after November 18, 1957, and prior to December 18, 1957, all of the preferred stock purchased by them, less any stock sold in accordance with the agreement, at a price $10 above the purchase price. During the same period the New Haven could "call" on the purchasers to sell the stock to the New Haven at the same price. The "put" to the New Haven was buttressed by a provision that if "for any reason such right should not, in the opinion of counsel for the Purchasers, be immediately enforceable in accordance with its terms, or if, for any reason, the New Haven shall fail to purchase the Preferred Stock," the purchasers might sell the stock and hold the New Haven liable for the difference between the agreed repurchase price and what was realized. The purchasers also agreed that prior to November 18, 1957, they would not sell any of the preferred stock without the approval of the New Haven, and that if they sold any of it at such prices that the net proceeds exceeded the amount

payable by the New Haven under its "call," they would pay such excess to the New Haven.

The agreement was consummated on November 18, 1955. The seven members of the banking group purchased 131,385 shares of the New Haven's preferred stock at $60 per share. They received "stock certificates registered in the names of the several purchasers" bearing specified certificate numbers. And the New Haven delivered to Union Securities on behalf of the group an instrument granting [redacted] "put" relating to these specific shares required by the [redacted]ber 10 agreement and providing that all other provisions of that agreement should continue in full force and effect.

The New Haven then gave another notice of a special meeting of stockholders to vote on the proposed $10,000,000 loan. The proxy statement disclosed the facts summarized above. The necessary stockholder approval was given, and the loan was made with authorization of the Interstate Commerce Commission.

By the spring of 1956 it had become apparent that the New Haven required additional funds to repair the flood damage. As a condition to securing an additional loan the New Haven was required to and did obtain a modification of the agreement with the banking group. This modification included a waiver of the New Haven's obligation to pay a $5 dividend on its preferred stock for 1955; a two-year postponement of the period of the put;[2] a change so that both the put and the call should apply to all or any part of the total amount of stock held by the group; an acceleration of one year in the period for

[2] The additional loan, initially $4,500,000, was evidenced by short-term notes maturing August 25, 1956. Later the loan was increased to $6,000,000, and made subject to Section 302 of the Defense Production Act of 1950, *supra*. Both the $6,000,000 loan and the $10,000,000 loan required principal payments of $500,000 each on December 30, 1957 and 1958. A two-year postponement of the "put" thus meant that $2,000,000 of the loans would become repayable before the "put" of the preferred stock could be made.

the call; and a provision that if the put or call should be exercised after repayment of the proposed loan and prior to payment of the $5 dividend for 1955, the put or call price should be $75 rather than $70 per share.

The New Haven did not seek authorization of the Interstate Commerce Commission to enter into these agreements. However, on November 29, 1955, the New Haven's Vice President-Treasurer, its Vice President-Law, and another attorney conferred with the chairman of the Interstate Commerce Commission's Finance Division and the Director of the Commission's Bureau of Finance with respect to the proposed $10,000,000 loan. The agreements between the New Haven and the banking group were disclosed to the Commission officials and copies were given them. The Vice President-Law informed them that the New Haven did not intend to apply for Commission approval of the agreements under §20a because he did not think it was required, that for this reason he was not filing the contracts officially, but that the New Haven desired the Commission to know about the transaction.

On March 13, 1956, the Commission issued a press release announcing that it would "institute an inquiry concerning agreements entered into recently by the New York, New Haven & Hartford Railroad Company whereby it undertook to repurchase certain of its outstanding securities, and concerning the accounting practices of that carrier to determine whether there has been any violation of the Commission's regulations or of the statutes administered by it, or any practices indulged in which are contrary to the best interests of the carrier or of the public." The record is not very informative as to the course of this "inquiry." Apparently no docket number was assigned, no hearings were held, no briefs filed or arguments made, and the inquiry was concluded without order of any sort. Our best information regarding it comes from the Commission's report in *New York, New Haven & Hartford R.R. Loan Guarantee*, 307 I. C. C. 105, 112 (1959). This states that the inquiry revealed

certain accounting irregularities for the years 1954, 1955, and 1956; that these irregularities were corrected through administrative action taken by the Commission; that the new management took steps to comply with the Commission's accounting regulations in the future; and that "The aforementioned informal inquiry was closed late in 1956."[3]

On November 17, 1958, the United States, suing on behalf of the Interstate Commerce Commission pursuant to 49 U. S. C. §12(1), brought this action in the Southern District of New York. It sought a declaratory judgment that the agreement between the New Haven and the banking group with respect to the preferred stock was unlawful and void, since authorization by the Commission under §20a(2) of the Interstate Commerce Act was required and had not been obtained, and a decree enjoining the defendants from carrying it out. The New Haven did not defend, and our references to "defendants" or "appellees" will relate to the banking group.

The defendants moved to dismiss the complaint under F. R. 12(b) or in the alternative to enter judgment on the pleadings under F. R. 12(c) of the Federal Rules of Civil Procedure. The government countered with motions for a preliminary injunction and for summary judgment, these being supported by certificates and statements from the Secretary of the Commission. The New Haven submitted affidavits setting forth the November 29, 1955 conference with the Commission officials and annexing the report of the Commission cited above in the margin (Footnote 3). Considering the defendants' motions as for summary judgment,

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[3] During the pendency of the inquiry, the Commission issued its report in *New York, New Haven & Hartford Securities*, Finance Docket No. 19416, Aug. 6, 1956, approving issuance of a substituted note for the $10,000,000 borrowed in 1955 and an additional note of $6,000,000 representing the additional loan discussed above. This report stated that procurement of the additional loan was a condition precedent to the extension by the New Haven "for 2 years of its contingent commitment to purchase certain shares of its preferred stock * * *"

the Court (McGohey, *J.*), in a brief opinion, granted the motions of defendants and denied those of the government. Later the Court entered the judgment embodying this action and dismissing the complaint from which this appeal is taken. While the problem is difficult and the case one of first impression, we have concluded that the District Court was in error and that the government is entitled to the relief sought.

On brief the government based its case in part on a claim that the agreement between the New Haven and the banking group constituted an "evidence of • • • indebtedness." The government did not press this contention in argument. We think it was wise in not doing so. For "indebtedness is merely the state of being in debt" and debt "means a sum of money due by certain and express agreements [citations] and does not include liabilities which are contingent in that it is uncertain as to whether anything will ever be demandable under the contract." *Sharpe* v. *First National Bank*, 220 Wis. 506, 264 N. W. 245, 247 (1936). Moreover, as developed below, the Commission has held that an evidence of indebtedness is not within §20a(2) unless it is in transferable form.

In order to prevail, therefore, the government must show that the transaction here under attack came within the provision of §20a(2) requiring Commission approval "for any carrier to issue any share of capital stock."

The New Haven did not here "issue" additional preferred stock in the sense in which "issue" is used in corporation law. The preferred stock was issued in 1947, pursuant to authorization granted by the Commission, 267 I. C. C. 867. However, it is far too late to argue that amendments of the terms of stock, bonds or notes, which are not "issues" in the corporation law sense, are not "issues" within §20a(2). From the enactment of §20a in 1920, the Commission has repeatedly asserted jurisdiction over changes in the terms of securities already "issued." The

Commission's decisions to this effect are legion, and the series is unbroken. Among the changes in the terms of securities which the Commission has considered to be within §20a(2) are extensions of maturity dates of notes and bonds,[4] changes of interest rates on bonds and notes,[5] and changes in the dividend rate of preferred stock.[6] The reasons behind this settled construction are obvious. The difference between a change in the terms of an outstanding security and its retirement and reissue is largely formal; and Congress could not have intended the Commission to be placed in a position where securities that the Commission had authorized on the basis of particular terms and conditions could be changed into quite different ones without its approval. Relying in part on "the long settled practice of the [Interstate] Commission in upholding its jurisdiction over securities, the maturity of which is extended," this Court has sustained a decision of the Securities and Exchange Commission that an extension of "investment certificates" of a public utility holding company was within §6(a) of the Public Utility Holding Company Act, 15 U. S. C. §79f(a), making it unlawful for any registered holding company to "issue or sell any security of such company" except in accordance with a declaration and order under §7 (15 U. S. C. §79g). The Court said that "To treat the proposed arrangement as beyond the jurisdiction of the Securities and Exchange Commission would seem to place

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[4] *Bonds of Erie R.R.*, 65 I. C. C. 131 (1920), *Notes of Union Terminal Co.*, 65 I. C. C. 286 (1920), *Securities of Waco B., T., & S. Ry.*, 90 I. C. C. 181 (1924), *Bonds of Iron Mountain R.R. of Memphis*, 131 I. C. C. 589 (1927), *Bonds of Statesboro Northern Ry.*, 154 I. C. C. 635 (1929).

[5] *Notes of Trans Mississippi Terminal R.R.*, 65 I. C. C. 450 (1920), *Bonds of Lancaster & Chester Ry.*, 70 I. C. C. 280 (1921), *Securities of Cadiz R.R.*, 71 I. C. C. 311 (1922); *Bonds of Northern Central Ry.*, 124 I. C. C. 253 (1927).

[6] *Increase in Dividend Rate on Preferred Stock by Virginian Ry.*, 72 I. C. C. 473 (1922), *Consolidated Freight Lines, Inc.—Stock*, 5 M. C. C. 749 (1938).

form above substance and to defeat the statutory purpose of safeguarding the public interest by affording the means of investigating the merits of such transactions by the Commission so that issues of securities may be stopped if found inexpedient for the security-holders." *SEC* v. *Associated Gas & Electric Co.*, 99 F. 2d 795, 797, 798 (2d Cir. 1938). Appellees do not succeed in distinguishing *Associated Gas* on the basis of the broader definition of "security" in §2(a)(16) of the Holding Company Act, 15 U. S. C. §79b(a)(16); for there the question was not whether the certificates were a "security" but whether their extension was an "issue or sale."

Indeed, appellees do not seriously question that if the same rights conferred upon them by the various agreements had been conferred upon all the preferred stockholders as a result of amendment of the New Haven's charter, authorization by the Commission under §20a would have been required.[7] In our view, however, the applicability of §20a (2) to a substantial change in the rights and obligations of a carrier and its stockholders does not depend on the particular method employed to effect the change. If the New Haven had invited preferred stockholders to accept new terms and to evidence their assent by depositing their stock with an agent designated by the New Haven for that purpose; this would have required Commission approval, even though the New Haven's charter was not altered and non-assenters were not affected. Indeed, that was precisely the case before this Court in *Associated Gas*. We see no reason

[7] This is a sufficient answer to the argument, which, indeed, has not been vigorously advanced, that because of the clause in §20(a)(2) forbidding a carrier "to assume any obligation or liability • • • in respect of the securities of any other person" without Commission approval, the statute cannot be read to forbid a carrier to assume additional obligations with respect to its own. For if "issue" includes amendment, as the settled administrative construction has been; there is no need for further prohibition on a carrier's assuming obligations with respect to its own stock, bonds or notes.

for a different result because here the New Haven, dealing with only a few stockholders who owned large blocks of preferred, was able to change the terms of that stock by simpler means.

Appellees place much reliance on a claim that what we have before us is a mere "executory agreement." We find no magic in the word "executory." Most preferred stock provisions, with respect to dividends, sinking funds, voting rights and the like, are to be performed in the future. Whatever the words, the facts are that if the agreements here are valid, the New Haven has become obligated in respect of appellees' shares for a sum nearly as great as the $10,000,000 flood loan which triggered this transaction, and appellees' shares are worth $75 whereas the current market value of shares not having the benefit of the agreements is around $12. Clearly appellees' shares have been changed under the highly practical tests of the marketplace. We think it would indeed be "to place form above substance and to defeat the statutory purpose" if, in the absence of other considerations that ought to lead us to that end, we were to say that an agreement having so great an economic effect did not modify the stock held by appellees. Concededly, the present case is a close one. But, in the absence of administrative construction supporting appellees' contentions, we prefer a construction of §20a of the Interstate Commerce Act that gives effect to its remedial purposes to give "the commission control over stock and bond issues" in order to avoid for the future abuses in the issuance of securities whereby "railroad properties have been bankrupted or saddled with almost overwhelming burdens of indebtedness, which have not increased the amount or value of property devoted to the public service, have not improved the service rendered, and have on the whole had the effect of increasing the charges for service,"[8] rather

[8] H. R. Rep. 456, 66th Cong. 1st Sess., at 21; testimony of Commissioner Clark, Hearings on Extension of Tenure of Government Control of Railroads, Senate Committee on Interstate Commerce, 65th Cong. 3d Sess., Vol. I, pp. 235-36.

than an interpretation, no more reasonable, that would frustrate them. For we must read statutes "not as theorems of Euclid but with some imagination of the purposes which lie behind them." *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, 553 (2d Cir. 1914), *cert. denied*, 235 U. S. 705 (1915).

We turn therefore to appellees' contentions that there is an established administrative construction in their favor:

(1) Appellees argue that the Commission's administrative construction of "issue" to include amendments has related only to amendments evidenced by physical stamping of the securities as distinguished from modifications evidenced only by agreement. But the government has cited a number of cases to the contrary,[9] and we think the Commission has properly regarded the question as being whether rather than how the terms of the securities were changed. The report in *Fonda, Johnstown & Gloversville R.R. Bonds*, 180 I. C. C. 249 (1932), relied on by the District Court, will not carry the weight that appellees put upon it. There the carrier applied for approval of (1) an extension of bonds to be evidenced by stamping or printing a legend of amendment on the bonds, detaching sheets of coupons and attaching new sheets, and (2) an agreement for the deposit of assenting bonds with the mortgage trustee who was to perform these acts. The Commission approved the application for amendment of the bonds but dismissed the application for approval of the agreement as not within Section 20a. Since in that case the bonds themselves were to be altered, the Commission evidently regarded the request for approval of the agreement as surplusage. We do not read the report in *Fonda* as meaning that if the agree-

[9] *Bonds of Erie R.R., supra; Notes of Union Terminal Co., supra; Notes of Western Maryland Ry.*, 79 I. C. C. 194, 196 (1923); *Securities of Waco B., T., & S. Ry., supra; Extension of Bonds of Port St. Joe Dock & Terminal Ry.*, 111 I. C. C. 217 (1920); *Peterborough & Hillsborough R.R. Bonds*, 117 I. C. C. 301 (1926); *Notes of Fredericksburg & Northern Ry.*, 150 I. C. C. 76 (1928).

ment, rather than the physical altering of the bonds, had been the legally operative act, the Commission would have declined jurisdiction over it; and any such ruling would have run counter both to reason and to the practice embodied in the decisions cited in Footnote 9.

(2) Appellees place heavy reliance on Commission decisions holding §20a inapplicable to various types of agreements imposing financial obligations on carriers. Among these are decisions holding the section inapplicable to contracts which evidenced indebtedness but did not take the form of bonds or notes, e.g., equipment purchase contracts, *Louisiana Ry. & N. Co.*, 67 I. C. C. 808 (1921); conditional sale contracts not evidenced by notes or bonds, *Lehigh Valley R.R. Conditional Sale Contract*, 233 I. C. C. 359 (1939); a contract to finance purchases assigned to a bank, *Gulf, Mobile & Ohio R.R. Purchase*, 261 I. C. C. 405 (1945); and other forms of indebtedness not evidenced by a note or bond, *Grand Trunk Western Ry. Indebtedness*, 70 I. C. C. 554 (1921), *Davidson Transfer and Storage Co., First Mortgage*, 282 I. C. C. 521 (1952). We do not regard these decisions as apposite except to the government's claim, which we have rejected, that the agreements here in question required approval as "evidence of • • • indebtedness." The Commission has also held that authorization under §20a(2) is not required when a carrier issues stock purchase warrants, *Norfolk Southern R.R.*, 240 I. C. C. 99 (1940), *Western Maryland Ry. Stock*, 295 I. C. C. 100 (1955). But we do not view these decisions (which may well rest on the fact that §20a(2) speaks only of the issuance of "any share of capital stock or any bond," whereas the later acts cited below, expressly include a "warrant or right to subscribe to or purchase any of the foregoing") as any abdication of the need for Commission approval of an agreement modifying an existing stock or bond. Appellees are quite right in saying that, in enacting §20a, Congress did not grant the Commission general power to pass

judgment on all obligations incurred by railroads and that, in this early essay in Federal security regulation, Congress did not enact so comprehensive a definition of "security" as it later did in the Securities Act of 1933, 15 U. S. C. §77b(1), the Securities Exchange Act of 1934, 15 U. S. C. §78c(a)(10), and the Public Utility Holding Company Act of 1935, 15 U. S. C. §79b(a)(15). But neither of these facts weakens the requirement for Commission authorization of agreements to alter those securities over which Congress did give the Commission jurisdiction, admittedly including preferred stock.

(3) Appellees claim that in its annual reports to the Congress the Commission has conceded that §20a(2) did not cover agreements such as those here before us and has recommended that its jurisdiction be expanded to include them, and that Congress has not seen fit to respond.

In fact, two different recommendations by the Commission are involved. On the view that we take of the case, neither is relevant.

The first recommendation appears in the Annual Reports for 1937, 1938, 1943, and 1944, 51 I. C. C. Ann. Rep. 105 (1937); 52 I. C. C. Ann. Rep. 121 (1938); 57 I. C. C. Ann. Rep. 132-33 (1943); 58 I. C. C. Ann. Rep. 105 (1944). This stemmed from the Commission's investigation of the bankruptcy of the very carrier here before us, *New York, N. H. & H. R.R.*, 220 I. C. C. 505 (1937). Referring back to its earlier inquiry, *New England Investigation*, 27 I. C. C. 560 (1913), the Commission advised Congress that for the second time the New Haven had plunged itself into serious financial difficulties by expending its funds for non-railroad property and interests in other railroads in a manner that the Commission was powerless to prevent. It was to enable itself to control such extra-curricular expenditures in the future that the Commission asked "that restrictions be imposed on the expenditure of carrier funds, the incurring of obligations, or the acquiring of property by a carrier or

its subsidiaries, except for the operation or legitimate improvement or development of its property." We find nothing in this to indicate a belief by the Commission that it lacked authority under §20a to prevent a carrier from altering its obligations with respect to its own securities.

The second recommendation, found in the Annual Reports from 1952 through 1955, 66 I. C. C. Ann. Rep. 147 (1952), 67 I. C. C. Ann. Rep. 147 (1953), 68 I. C. C. Ann. Rep. 128 (1954), 69 I. C. C. Ann. Rep. 124 (1955), was that Congress reverse the result reached by the Commission in *Lehigh Valley R.R. Conditional Sale Contract, supra,* that "evidence of * * * indebtedness" did not include indebtedness under a conditional sale not evidenced by a bond or note, and include in §20a(2) "any contract for the purchase or lease of equipment not to be fully performed within 1 year from the date of the contract." This is irrelevant for reasons developed above.

(4) Appellees' final and, we think, most serious contention on administrative construction relates to the Commission's conduct in this very case. They assert that the Commission's three years of inaction after full disclosure of the agreements in November 1955, save only for the institution in March 1956 of the inquiry that was closed late that year, brings the case within *United States* v. *Chicago, North Shore & Milwaukee R.R.*, 288 U. S. 1 (1933), where the Supreme Court found the Commission had established an administrative construction of non-applicability of §20a so definitive as to forbid a change. While we in no way condone the long delay by the Commission in making its challenge to the instant agreements, a delay that may well prove to have been seriously prejudicial to appellees because of the decline in the market value of the New Haven preferred, the facts here are a long way from those which there led the Supreme Court to find a clear "case of uniform administrative construction of §20a as applied to this company." 288 U. S. at 13.

Opinion of Court of Appeals, dated November 2, 1959.

In *North Shore*, the United States, at the request of the Commission, sought to enjoin the carrier from issuing securities without Commission authorization. The North Shore answered that it was "an interurban electric railway which is not operated as a part of a general steam railroad system of transportation" and thereby exempted from §20a(1). The record showed that from the enactment of §20a in 1920 the Commission had never previously challenged the North Shore's claim to the exemption; that during that period the North Shore had issued $61,662,600 of securities without Commission authorization; that the annual reports filed by the North Shore with the Commission had fully disclosed the character of its operations and the issuance of these securities, and had stated that the latter were issued with the authority of the regulating commissions of Wisconsin and Illinois; that in one instance the North Shore had failed to include this statement and on inquiry from the Commission had supplied it; and that the Director of the Commission's Bureau of Finance had formally advised the North Shore that it came within the narrower exemption for interurban electric railways in the then §15a of the Interstate Commerce Act. The Court's opinion recites also that, in a series of Annual Reports to Congress, for 1921, 1923, 1924 and 1925, the Commission had called attention to its lack of jurisdiction under §20a over the securities of independent interurban electric railways which, like the North Shore, were "engaged in the general transportation of freight in interstate commerce in addition to the transportation of passengers," some of which "correspond substantially to steam roads in all important particulars except that of motive power," although §15a included "such interurban electric lines as are engaged in the general transportation of freight" even though independent, and had asked that §20a be amended; that in its 1928 report the Commission made a specific proposal for narrowing the §20a exemption; and that Congress had consistently refused to act. Moreover, the North

Shore did not stand alone. The Commission had equally failed to challenge the exemption of other independent interurban electric railways whose operations were generally similar to the North Shore, and in one instance had formally disclaimed jurisdiction over such a line under the identical language of §1(22), *Proposed Acquisitions by Cincinnati, Hamilton & Dayton Ry. Co.*, 154 I. C. C. 603 (1929).[10] The Supreme Court thus had ample evidence for concluding that the Commission's dozen years of failure to enforce §20a against the North Shore and similar carriers represented not oversight or indecision but an administrative determination quite as definite as if embodied in a formal ruling.

Here we have no such adequate evidence. We have only an isolated transaction, an inconclusive discussion, an abortive inquiry, and then two years of silence. It is possible, of course, that silence here meant assent—by someone; but we cannot find a sufficiently clear basis for inferring from what the Commission did and did not do an administrative construction that was never expressed. If 60 years of Commission failure to consider maintenance-of-way vehicles to be within the Safety Appliance Act was not sufficient evidence for the Supreme Court to infer an administrative determination, *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U. S. 325, 330-31 (1957), we cannot hold three years of inaction eked out by an informal inquiry to be enough.

Appellees were not obliged to rely on so infirm a foundation. They could have required the New Haven to apply under §20a for approval of the agreement while at the same time moving to dismiss the application for want of jurisdiction, see *Lehigh Valley R. R. Conditional Sale Contract, supra*, and *Davidson Transfer and Storage Company,*

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[10] *Piedmont & Northern Ry.* v. *I. C. C.*, 286 U. S. 299 (1932), discussed in the Court's opinion (pp. 10-11), constituted no exception to the uniform administrative construction, since the Piedmont was primarily an interchange carrier engaged in the handling of carload interstate freight.

supra, or they could themselves have sought a declaratory order under §5(d) of the Administrative Procedure Act, 5 U. S. C. §1004(d). No serious delay need have resulted; for the Commission normally acts on finance applications with relative promptness.

We have dealt with appellees' contention as to the Commission's action and inaction in terms of administrative construction rather than of estoppel, since that is the basis on which appellees have argued. In any event the applicability of the doctrine of estoppel to regulatory agencies is, to say the least, doubtful. See *SEC* v. *Morgan Lewis & Bockius*, 209 F. 2d 44, 49 (3d Cir. 1953).

Appellees appear at times to suggest that although no single one of the four contentions as to administrative construction which we have just reviewed may be conclusive, the combination is. However, we have found that appellees' first contention is not made out and that the second and third deal with matters which are irrelevant to the only government contention that we sustain. Consequently we are left only with the fourth. This we deem insufficient, for the reasons set forth above.

Appellees assert that in no previous case has the Commission or a court applied Section 20a to a transaction such as that here before us. The government does not dispute this but answers there are also none where the Commission or a court has refused to do so. Under these circumstances the mere fact of novelty does not show where the path of correct decision lies. The problem of interpreting statutes is inevitably one of applying old terms to new situations. Our task is to determine whether, if Congress had envisioned this case, it would have wished to require Commission authorization before a railroad undertook new obligations to stockholders such as those which the New Haven has assumed, and, if so, whether the words that it used were sufficient to express that desire and thereby give fair warning to those who read them. We entertain no doubt in giving an affirmative answer to the

former question; and we think that, once "issue" was broadened by nearly four decades of unquestioned administrative construction to include "alter" or "amend," the same answer must be given to the latter. For we must construe §20a, as the Supreme Court has construed the Securities Act, in the light of " • • • the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350-51 (1943).

The District Court ought therefore have granted the government's motion for summary judgment and denied the motions of the banking group, and it should now do so. In order to protect the rights of appellees in the event that rehearing or certiorari should be sought and granted and our judgment reversed, the injunction should contain an exception permitting any or all members of the group, if so advised, to give notice of the exercise of their put during the period between November 18 and December 18, 1959. In view of the short time remaining before November 18, 1959, when the put becomes exercisable, the mandate shall issue on November 10, 1959, unless, if the banking group desires to apply for rehearing, the banking group and the New Haven stipulate that no action under the agreements other than the giving of notice will be taken pending further order of this Court.

Judgment reversed.

Opinion of Court of Appeals Denying Rehearing, Dated December 2, 1959.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 109—OCTOBER TERM, 1959

(Petition for rehearing filed November 17, 1959

Decided December 2, 1959.)

Docket No. 25793

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, TRI-CONTINENTAL FINANCIAL CORPORATION, A. C. ALLYN AND COMPANY, INCORPORATED, AMERICAN TRANSPORTATION ENTERPRISES, INC., EQUITABLE SECURITIES CORPORATION, CARL M. LOEB, RHOADES & CO., THE ROBINSON-HUMPHREY COMPANY, INC., and JOHN W. CLARKE & CO.,

Defendants-Appellees.

Before:

LUMBARD, WATERMAN and FRIENDLY, Circuit Judges.

On Petition for a Rehearing

Per Curiam:

The arguments, advanced in appellees' petition for rehearing, that the obligations undertaken by the New Haven ran to them as bankers rather than as stockholders

and that we failed to give due effect to *Lehigh Valley RR., Conditional Sale Contract,* 233 I. C. C. 359 (1939), raise no questions not fully considered when the case was first before us. However, appellees make two contentions as to which a further word may be warranted.

The first is that assuming that we were right, which appellees, of course, deny, in reversing the grant of appellees' motion to dismiss the complaint or for judgment on the pleadings, we were nevertheless wrong in also holding that the government's motion for summary judgment should be granted. The contention is that appellees are entitled to develop the facts as to the action or inaction by the Commission with respect to the agreement here in question and "as to the economic effect of the transaction in suit at the time it was entered into." However relevant evidence on this latter point may have been before the Commission if permission under 20 (a) had there been sought, it is clearly irrelevant here before us now. And as to both points appellees' proposal comes too late.

The government moved for summary judgment on January 7, 1959. Its motion and appellees' motion for judgment to dismiss or for judgment on the pleadings were argued together before Judge McGohey on February 17. The only additional facts that anyone sought to bring to the attention of the District Court were a "certificate and statement" of the Secretary of the Interstate Commerce Commission dealing with the Commission's inquiry and stating that "A diligent search of the records of the Commission fails to reveal any Commission action, formal or informal, approving the Agreements, or any of them," affidavits of the New Haven's Vice President-Law and his associate as to the November 29, 1955 conference, and the Commission's report of August 6, 1956 referred to in footnote 3 of our opinion. If appellees believed there was any triable issue of fact, that was the time for them to say so. It is no excuse to say, as they now do, that the facts were

in the exclusive possession of the government; for Fed. R. Civ. Proc. 56(f) gave any needed remedy. No suggestion as to the existence of any triable issue of fact was made, and the District Judge stated in his opinion:

"All parties agree and I independently find that no genuine issue as to any material fact is raised on any of the motions." No contrary contention was made to us in the briefs or at the argument of the appeal. The proposal for a trial comes too late on petition for rehearing after judgment on appeal, even if we were to assume in appellees' favor that their exploration could develop facts having legal significance—an assumption which we deem highly dubious.

Appellees' second complaint is that our directions to the District Court as to the form of judgment are unclear and erroneous. Their expressed fear that our direction to grant the government's motion for summary judgment might lead the District Court to grant the government's prayer that the agreement be declared invalid as "an unlawful issuance of evidence of indebtedness", which we specifically rejected, is captious. We are confident that, in this and other respects, the District Court requires no further direction from us to carry out its normal obligation to frame an order not inconsistent with our opinion. In particular appellees raise the question whether we intended the District Court to annul the provision of paragraph 6(d), quoted in our opinion, that if the right of appellees to put the stock to the New Haven should not in the opinion of their counsel be immediately enforceable, or if for any reason the New Haven should fail to purchase the stock, appellees might sell the stock and hold the New Haven liable for the difference between the agreed repurchase price and what was realized. We answer in the affirmative. Any other answer would permit the purposes of Section 20(a) to be frustrated.

The petition for rehearing is denied.

APPENDIX D.

APPENDIX D.

Texts of Relevant Statutes.

(1) 28 U. S. C. §1292(a)(1) (1958) reads as follows:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

(2) Section 20a of the Interstate Commerce Act, 41 Stat. 494 (1920), as amended, 49 U. S. C. §20a (1958), reads in pertinent part as follows:

"• • •

"(2) Issuance of securities; assumption of obligations; authorization.

It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person,

natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * *

"(11) **Securities issued contrary to law void; effect; penalty.**

Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action

in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney, or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court."

FILE COPY

MOTION FILED MAR 28 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION, *Petitioner,* v. HELENE GLENMORE, CELIA SCHREIBER, DOROTHY HENESSY, MARTIN KOLBRENER, ISADORE BLAU, and THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Respondents.*	PETITION FOR A WRIT OF CERTIORARI No. 742
TRI-CONTINENTAL FINANCIAL CORPORATION, *Petitioner,* v. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, *Respondent.*	MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT Misc. No. 813

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTARY APPENDIX.

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March 28, 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,
v.
HELENE GLENMORE, CELIA SCHREIBER, DOROTHY HENESSY, MARTIN KOLBRENER, ISADORE BLAU,
and
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
No. 742

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,
v.
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT
Misc. No. 813

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTARY APPENDIX.

On March 23, 1960, some three weeks after the filing by Tri-Continental Financial Corporation ("Tri-Continental") of its petition and motion herein, the Court of Appeals for the Second Circuit took an extraordinary step in this case which vividly points up the need for review of its judgment by this Court.

By a vote of 3-2, the full bench of the Court of Appeals denied an "application for hearing *in banc*" made by one of its own members, Judge Charles E. Clark, for the purpose

of having the full court reconsider the panel decision of January 29[1] that the judgment of the District Court,[2] which the panel reversed, was appealable under 28 U. S. C. §1292(a)(1) (1958).

Judge Clark, joined by Judge Waterman who had dissented from the opinion and judgment of January 29, filed a nine-page opinion in which he, too, dissented from that earlier opinion of the court. "The matter", Judge Clark wrote,

> "is of such importance in our daily practice that it seems desirable now for me to point out the uncertainty of the ruling both for the present case and for the future. • • • [T]he confusion this ruling will make in our law is apparent; it is enhanced when we note the steady current of opposing decisions in other circuits and in states following the federal rules. • • • A diligent search has not uncovered any definite support for that holding in other circuits or in states following the federal rules."[3]

Judge Friendly, joined by Chief Judge Lumbard and by Judge Moore, who expressed no view on the merits but felt *in banc* reconsideration inappropriate, also filed an opinion in which he defended the propriety of the earlier opinion of January 29. In this opinion Judge Friendly endorsed Judge Clark's comment in *Federal Glass Co. v. Loshin*, 224 F. 2d 100, 101 (2d Cir. 1955) that

> "A resolution of these conflicts [on the question of appealability in cases of this type] must ultimately come from the Supreme Court."[4]

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[1] See Appendix B to Tri-Continental's Petition of February 29, 1960 (hereinafter "Petition"), pp. B-16-B-24.

[2] *United States* v. *New York, N. H. & H. R. R.*, 170 F. Supp. 562, Petition, Appendix A (S. D. N. Y. 1959).

[3] See Appendix hereto, denominated "Appendix E," pp. 1108, 1113, 1114.

[4] *Id.* at 1118.

Since SUPREME COURT RULE 23 (i) requires a petitioner for a writ of certiorari to append to his petition "a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed" and since the two new opinions in the Court of Appeals for the Second Circuit cast such important light on the question of appealability which Tri-Continental has presented to this Court for review, Tri-Continental prays leave to file those opinions, appended hereto, as Appendix E to its petition for a writ of certiorari and motion for leave to file petition for writ of mandamus or other appropriate writ of February 29, 1960.

Respectfully submitted,

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March 28, 1960.

APPENDIX E.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1959.

March 23, 1960.

Docket No. 25879

HELENE GLENMORE *et al.*,

Plaintiffs-Appellants,

—v.—

JOHN I. AHERN *et al.*,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge*, and
CLARK, WATERMAN, MOORE and FRIENDLY, *Circuit Judges.*

On application for hearing *in banc.*

CLARK, *Circuit Judge* (dissenting):

In this case a panel majority has held, against strong dissent by Judge Waterman, that a trial judge's rejection of one theory of liability, leaving others pending, is the denial of an injunction sufficient to support an appeal and reversal for issuance of the injunction. *Glenmore* v. *Ahern*, 2 Cir., Jan. 29, 1960. Since this raises questions of the most serious nature, I asked all my brothers, as soon as I learned of the ruling, to consider it further *in banc*. While the vote

was divided, it was against such consideration here. The matter is of such importance in our daily practice that it seems desirable now for me to point out the uncertainty of the ruling both for the present case and for the future. I am not enamored of *in banc* proceedings; in the particular cases where we have tried them, they appear to have raised more questions than they have settled. But so long as we do order them at least occasionally, it would appear that a decision such as this on a continually recurring issue of practice, against so many strong precedents and reasons of policy, is one made to order for such procedure if any case is.

Naturally I am sorry that I could not express these convictions before or at least with the filing of the decision, as would have been possible had our custom of intramural warnings of the approach of overruling opinions been observed here. As it was, I acted at the earliest possible moment. My dissent appears to have had one unique consequence in that it has induced a counterdissent to it wherein my authority to take these steps seems to be questioned. I do not see how this can be pressed, since the statute authorizing *in banc* procedure, 28 U. S. C. §46(c), contains no such restriction and the leading case, *Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U. S. 247, 250-277, continually stresses *judicial* as opposed to *party* initiative and quotes legislative history to support that conclusion. Further, I do believe the court gains standing by encouraging free and thorough canvassing of these issues without the deadening influence of constraining restrictions.

The decision was rendered in a stockholders' derivative action, which challenged as invalid without I. C. C. approval transactions between the New Haven Railroad and certain bankers to raise money on loan through the means of somewhat involved transfers of a large block of preferred stock.

The district court had held the transactions valid, but in the companion appeal of *United States* v. *The New York, New Haven & Hartford R. Co.* my brothers first ruled—at the behest of the United States on behalf of the Interstate Commerce Commission—that they were invalid. 2 Cir., Nov. 2, 1959. Later, however, they ruled that they lacked authority to pass on that issue, since appeal must go directly to the Supreme Court; and then in the same opinion a majority reversed the dismissal of Count 6 of the stockholders' complaint to issue an injunction substantially similar to the one they were holding beyond their authority in the action by the United States. This is the decision of January 29, 1960, cited above. Count 6, under the pleader's course of pleading different legal theories in separate counts,[1] alleged the invalidity of the transactions in issue for lack of I. C. C. authorization.[2] The judge dismissed this count in what he termed a final order, but my brothers aptly say: "The judgment plainly was not final even as to the transactions here challenged, since other theories of liability remained," and again "• • • even as to the transactions here challenged, other grounds for the grant of an injunction remained undetermined." Nevertheless they hold it "appealable as an interlocutory order refusing an injunction under §1292(a)(1)" of 28 U. S. C.

Under the settled federal rule that "claim" refers to the operative facts giving rise to an enforceable right, and not

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1 Now undesirable (as the event here again tends to show), but not actually forbidden. See Clark, Code Pleading 459-461, 462-464 (2d Ed. 1947); F. R. 10(b); *Gins* v. *Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974, 976.

2 Of the ten counts left standing, numbers 5 and 7 are particularly interesting, since they are so precisely similar to 6, except that 5 relies on the Investment Companies Act, and 7 on the railroad charter, to show invalidity of the questioned transactions.

to legal theories, *Original Ballet Russe* v. *Ballet Theatre*, 2 Cir., 133 F. 2d 187, it is clear that here the claim refers to the money-raising transactions, the invalidity of which is asserted in this litigation. Hence the claim has not yet been fully passed upon; the judge has merely said in an interlocutory ruling that he will not accept one ground of asserted invalidity. See the opinion below, D. C. S. D. N. Y., 170 F. Supp. 562, 567. This may be useful in illustrating his approach to the parties and warning them of what they must do to persuade. Beyond this it is indeed difficult to see what it can mean by way of definitive action. For it is the judge's decision on the transactions themselves which is important; his rationale is not decisive. When the time for final action comes he may use another rationale or vary his present one or disclose none at all; whatever he has said he will be in error only if his decision is incorrect. A right decision for the wrong reason is always acceptable. This is so elemental that its partial challenge here is strange. Just what has been determined either by the ruling below or the reversal here? The answer is nothing. After a full hearing below the judge may revert to his original analysis or adopt any other which he thinks may lend persuasive force to his adjudication. So the judge has not yet denied an injunction, and it is improper for us to act as though he had. Of course the parties could have asked the judge for immediate more definitive action by simply bringing on the issue of the award of an injunction *pendente lite*, instead of the present proceedings seeking only a partial summary judgment. But the difference between a mere "step" in controlling the litigation before the trial court and definitive adjudication is a naturally recurring one, often explained and defined, as in *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 184; *City of Morgantown, W. Va.* v. *Royal Ins. Co.*, 337 U. S. 254. The conced-

edly interlocutory nature of the ruling here seems in fact more obvious than in the cases just cited.[3]

The basis for the holding here according some more definitive character to the judge's present action is based upon the first opinion in *Federal Glass Co.* v. *Loshin*, 2 Cir., 217 F. 2d 936, rendered by a divided court.[4] It should be noted that there Judge Smith below had spoken rather decisively against the grant of an injunction, so that there was more support for the substance of the decision than here; but the language of the opinion spoke so decisively of wide appealability as not to carry assent; and two active circuit judges expressed their nonconcurrence in this approach when the case appeared later. *Federal Glass Co.* v. *Loshin*, 2 Cir., 224 F. 2d 100. So even on the authorities relied on, the

3 It is necessary to stress the judge's undoubted power to make a definitive ruling when he so chooses because question is suggested as to whether he must state all the grounds for decision or can raise doubts of irreparable damage and so on. Of course he is not so hampered and the issue is or should not be on rationale, but as to what, if anything, he has decided. Once his intent is clear, then it is a question of applying the normal principles of law to his action. Naturally the issue here is not the sole one possible; thus there may be a serious question whether a trial judge has granted merely a temporary restraining order which is not appealable or a temporary injunction which is. See, e.g., *Connell* v. *Dulien Steel Products, Inc.*, 5 Cir., 240 F. 2d 414, noted in 71 Harv. L. Rev. 550; *Madison Shipping Corp.* v. *National Maritime Union*, 3 Cir., 273 F. 2d 955.

4 Also cited is *Telechron, Inc.* v. *Parissi*, 2 Cir., 197 F. 2d 757, which quite clearly is not apposite; for that dealt with two separate claims, a federal claim for patent infringement and a common-law or state claim for disclosure of confidential relations. So far apart had our court considered these claims that it would not even allow the state claim to be asserted in a federal court, see, e.g., *Musher Foundation* v. *Alba Trading Co.*, 2 Cir., 127 F. 2d 9; and it took a new statute granting federal jurisdiction over both these "claims," 28 U. S. C. §1338(b), and the overruling in *Parissi* of a first restrictive decision to get this second claim even recognized federalwise. This history is set forth in my dissent in the overruled case, *Kleinman* v. *Betty Dain Creations*, 2 Cir., 189 F. 2d 546, 549-555. So dismissal of the separate nonpatent claim, with the finding of finality under F. R. 54(b), was obviously denial of an injunction as to it.

count would seem to have been far from decisive, as the two opinions herein tend to assume.[5]

Actually, however, there have been more lately a whole series of cases in this court, not noticed in the original majority opinion, which rather completely establish that the merely interlocutory rulings of an equity judge advancing the case on his calendar may not properly be considered either the grant or denial of an injunction. Thus see *Greenstein* v. *National Skirt & Sportswear Ass'n*, 2 Cir., Jan. 28, 1960; *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283*, 2 Cir., 269 F. 2d 618; *Marco* v. *Dulles*, 2 Cir., 268 F. 2d 192; *Fleischer* v. *Phillips*, 2 Cir., 264 F. 2d 515, certiorari denied *Fleischer* v. *Benjamin*, 359 U. S. 1002. The two most recent (and unanimous) cases just cited are instructive in holding that an order granting a stay *pending arbitration* in an action seeking injunction did nothing more—in the words of Judge Hand in the *Armstrong-Norwalk* case, *supra*, 2 Cir., 269 F. 2d 618, 621—"than forbid the plaintiff from pressing its action pending the arbitration," which was "only a step in the action itself." And the other two cases dealt with orders refusing to disqualify attorneys in injunctive actions. The last case cited—the first of this group in point of time—refers to the wealth of precedents from other circuits.

Additionally a further substantial line of recent cases are definitely at variance with this result; they are cases where we have dismissed appeals for lack of final judgment which should have been held appealable as rulings on injunctions, had my brothers' present views been then ac-

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5 I doubt if *Raylite Elec. Corp.* v. *Noma Elec. Corp.*, 2 Cir., 170 F. 2d 914, is to be considered present authority, since admittedly it was decided at a date before extensive consideration of the issue had been had and in the *Loshin* case itself, its reconsideration was thought appropriate. And Judge Swan, who wrote the opinion, has shown himself amenable to majority view, as in *Marco* v. *Dulles*, 2 Cir., 268 F. 2d 192, and *Goldlawr, Inc.* v. *Heiman*, 2 Cir., 273 F. 2d 729.

cepted. They include *Goldlawr, Inc.* v. *Heiman*, 2 Cir., 273 F. 2d 729; *John & Sal's Automotive Service* v. *Jones Beach State Parkway Authority*, 2 Cir., 267 F. 2d 862; *Gauvreau* v. *United States Pictures, Inc.*, 2 Cir., 267 F. 2d 861; *Schwartz v. Eaton*, 2 Cir., 264 F. 2d 195; *Colt Beverage Corp.* v. *Canada Dry Ginger Ale*, 2 Cir., 243 F. 2d 795. Since this is a question of jurisdiction, I think we must be as alert to sustain our jurisdiction as to deny it in a proper case; the failure of counsel to bring up the argument is not enough to deny it. Hence the confusion this ruling will make in our law is apparent; it is enhanced when we note the steady current of opposing decisions in other circuits and in states following the federal rules.

The leading case is probably Judge Hastie's notable and often-cited decision in *Morgenstern Chemical Co.* v. *Schering Corp.*, 3 Cir., 181 F. 2d 160, the rationale of which has never been answered. See in accord *Albert* v. *School Dist. of Pittsburgh*, 3 Cir., 181 F. 2d 690, 691; *American Airlines* v. *Forman*, 3 Cir., 204 F. 2d 230; *District 65, Distributive, Processing and Office Workers Union of New York and New Jersey* v. *McKague*, 3 Cir., 216 F. 2d 153; *Wallace Products, Inc.* v. *Falco Products, Inc.*, 3 Cir., 242 F. 2d 958; *Division 689, Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees of America, A.F.L.* v. *Capital Transit Co.*, D. C. Cir., 227 F. 2d 19; *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc.*, D. C. Cir., 232 F. 2d 366, 369; *Spruill* v. *Cage*, 6 Cir., 262 F. 2d 355; *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 7 Cir., 187 F. 2d 65, certiorari granted 341 U. S. 930, dismissed by stipulation 342 U. S. 802; *Brandt* v. *Renfield Importers, Ltd.*, 8 Cir., 269 F. 2d 14; *Baltimore Contractors* v. *Bodinger, supra*, 348 U. S. 176; *City of Morgantown, W. Va.* v. *Royal Ins. Co., supra*, 337 U. S. 254; *Maybury* v. *City of Seattle, Wash.*, 336 P. 2d 878, 881; *Settem* v. *Etter*, 236 Minn. 514, 53 N. W. 2d 467; *Smith* v.

Hamilton, 70 Nev. 212, 265 P. 2d 214; *Bell* v. *Davis*, Tex. Civ. App., 287 S. W. 2d 733; *F. & T. Development Co.* v. *Morris*, Tex. Civ. App., 248 S. W. 2d 233. Some of these decisions specifically criticize the first *Loshin* case, e.g., the *Division 689* and *Maybury* cases, as do also the text writers, 3 Barron & Holtzoff, Federal Practice & Procedure §§1241, 1242 (Wright Ed.); 6 Moore's Federal Practice 49-51, 2321 (2d Ed. 1953).[6] A diligent search has not uncovered any definite support for that holding in other circuits[7] or in states following the federal rules. Nor is it possible, in view of both the careful analysis and the specific holdings of these precedents, to push them aside on any attempted fragmentation of the issue of interlocutory appeals and the statute, 28 U. S. C. §1292(a)(1). It is regrettable that our recent return to the Union is now to be repudiated without discussion of the weight of policy and precedent against that course.

The decisions indicate that nowhere else in the country is the issue of piecemeal appeals in such acute condition as here. Presumably it is due somewhat to the permeation of local practice, for New York is notorious for interlocutory appeals—a fact which is said to lead lawyers to choose the federal courts where available. Harper & Atwood, Civil Practice in the Federal Courts (Practising Law Institute, July 1956 Ed.) 1, 2. What we are doing is to invite a plethora of such appeals. Every motion day has numerous

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6 This seems generally true of the law review comments on the case. 4 Buffalo L. Rev. 355; 68 Harv. L. Rev. 1278; 39 Minn. L. Rev. 921; 103 U. of Pa. L. Rev. 816; 7 Stanford L. Rev. 549.

7 Possibly it has support in a single case, *International Forwarding Co.* v. *Brewer*, 5 Cir., 181 F. 2d 49, although the discussion (at an early date when only the *Raylite* opinion was available) is so summary that little can be deduced from it. It seems also partially supported in Judge Danaher's dissent in *Division 689, Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees of America, A. F. L.* v. *Capital Transit Co.*, D. C. Cir., 227 F. 2d 19, cited *supra*.

ones involving such questions as denials of leave to amend pleadings or refusals to quash service;[8] while most of these are quite properly (if somewhat inconsistently) denied, yet the burden remains. And more than occasionally an utterly inconsistent decision appears.[9] No wonder counsel are confused. Judge Waterman's unanswered dissent in this case states the correct course, and it is my earnest hope that it may be followed hereafter.

Of course assumption of nonexistent jurisdiction perhaps often does not do much harm except to add substantially to the burdens of an overburdened appellate court and to invite other such appeals. Thus attempted affirmance may perhaps amount to hardly more than an interim accolade to the trial judge. But often it may raise much more serious questions. Here it would seem we have such a case. For the court has assumed to issue a rather far-reaching injunction affecting substantial financial interests in a case where

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8 Thus three of such abortive appeals were dismissed at the last motion session in which I participated, together with my brothers Moore and Friendly.

9 An example is *Goldlawr, Inc.* v. *Heiman*, *supra*, 2 Cir., 273 F. 2d 729, where after the court had denied its jurisdiction for lack of an appealable final judgment, Dec. 29, 1959, it proceeded on Jan. 18, 1960, to vacate the very judgment over which it had held it had no power. This is contrary to the settled view that the court must always note the absence of an appealable order whenever shown, and must cease further activity even though the parties are prepared to consent or waive the objection. See the many cases cited in the text of this dissent between footnotes 5 and 6. The cases cited in the second *Goldlawr* opinion appear not to be in point. *Phillips* v. *United States*, 312 U. S. 246, and *Rorick* v. *Board of Comm'rs of Everglades Drainage Dist.*, 307 U. S. 208, concerned only the proper routing for purposes of review of district court judgments which were actually quite final, i.e., the issue presented in the companion case herewith decided, namely, *United States* v. *The New York, New Haven & Hartford R. Co.* And *In re Cook's Motors*, 1 Cir., 142 F. 2d 369, a case concededly of "peculiar circumstances" where trial admonition was superfluous—one not heretofore cited as defining appellate power—actually involved the settlement of claims against a bankruptcy estate under the admittedly broad federal jurisdiction in bankruptcy.

it lacks jurisdiction. It seems to me that the injunction must be held invalid; hence its potentialities of damage are extensive. A rehearing *in banc* would have afforded opportunity to settle some of these issues now left blind.

I am authorized to state that Judge Waterman concurs in this opinion.

FRIENDLY, *Circuit Judge*:

To Chief Judge Lumbard and me, the four opinions already written would have seemed sufficient, even for the tangled problems in this and its companion case, *United States* v. *New York, New Haven & Hartford RR. Co., et al.*, November 2, 1959: November 13, 1959; majority and concurring-dissenting opinions January 29, 1960. This is particularly true since the cases are now before the Supreme Court, which can review both the many substantive and procedural questions on which this Court was unanimous and the single procedural question, the appealability under §1292(a)(1) of the refusal of the injunction in the New Haven stockholders' suit, as to which Judge Waterman dissented. Now we have a fifth opinion, on that point. We feel obliged to note that the course which has brought this to us would mean that any active judge may publish a dissent from any decision, although he did not participate in it and the Court has declined to review it *en banc* thereafter, a practice which seems to us of dubious policy especially since, if the issue is of real importance, further opportunities for expression will assuredly occur.[1] We would not have responded but for the assertions, unwarranted as we think,

1 Despite our brother Clark's expressed belief "that in a proper case a panel of this court may frankly state its disagreement with a decision of another panel and refuse to be bound thereby," *Dunbar* v. *Henry DuBois' Sons Co., Inc.*, decided February 10, 1960, p. 722, we would favor what he characterizes as a "custom of intramural warnings of the approach of overruling opinions" so as to permit a request for an *en banc* before judgment is rendered. There was no occasion for such

that our opinion left Judge Waterman's dissent unanswered and that we overlooked a series of cases in this Court which apparently are claimed to have overruled *sub silentio*, or at least to have undermined, the authority on which we relied.

The issue is the interpretation of the word "refusing" in 28 U. S. C. §1292(a)(1) which, so far as here material, gives the courts of appeals jurisdiction over appeals from "Interlocutory orders of the district courts * * * refusing * * * injunctions."

The first problem to arise in this regard was whether denial of a motion by a plaintiff for summary judgment in a suit for an injunction on the ground that there was a triable issue of fact was an order "refusing" an injunction. In *Raylite Electric Corp.* v. *Noma Electric Corp.*, 170 F. 2d 914, 915 (2d Cir. 1948), a unanimous Court (Judges Learned Hand, Swan and Chase) held that it was. Two years later, in *International Forwarding Co.* v. *Brewer*, 181 F. 2d 49 (1950), the Fifth Circuit held likewise in a case where a plaintiff's motion for judgment on the pleadings in an injunction action had been denied. However, on the very same day, the Third Circuit, in *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F. 2d 160 (1950), reached a result opposite to ours in *Raylite*. In view of the able opinion there

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a warning here since neither the majority nor, as we read Judge Waterman's opinion, the dissenter, thought we were doing this.

Although the vote against the *en banc* renders the point moot, we do entertain serious doubts whether, in the absence of any court rule or practice, an *en banc* may be ordered at the request of a judge not participating in the decision, made after judgment was rendered (although unavoidably so), when no request for this has been made by a party. We do not read the remark in *Western Pacific RR. Case*, 345 U. S. 247, 262 (1953), as to the court's power "to initiate en banc hearings *sua sponte*," as independent of the Supreme Court's admonition, pp. 260-61, "It is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice—whatever it may be—whereby the court convenes itself en banc." This seems peculiarly applicable after judgment has been rendered and further appellate proceedings are about to be taken.

rendered by Judge Hastie, this Court reconsidered the question on a motion to dismiss the appeal in *Federal Glass Co.* v. *Loshin*, 217 F. 2d 936 (2d Cir. 1954). The majority, Judges Learned Hand and Frank, adhered to the result reached in *Raylite;* Judge Clark dissented. No request was made for an *en banc*. Despite what was said when the *Loshin* case came before the Court on the merits, 224 F. 2d 100 (1950), the issue was evidently deemed settled for this Circuit. For Judge Clark's opinion in the second *Loshin* case stated, at page 101, that "A resolution of these conflicts must ultimately come from the Supreme Court." [2] Neither the circumstance, not especially surprising, that the Third Circuit has followed its own *Morgenstern* decision nor the fact that this has attracted some following,[3] seemed to us to warrant reexamination of a matter that had already re-

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2 Of the judges in this Circuit who had considered the problem, four, Judges Learned Hand, Swan, Chase and Frank, had held that an order denying a motion for summary judgment by a plaintiff in an action for an injunction was appealable under §1292(a)(1); two, Judges Clark and Medina, thought it was not.

3 Its following, at least in the Federal courts, is nothing like so great as the long list of citations would indicate. In *Division 689* v. *Capital Transit Co.*, 227 F. 2d 19 (D. C. Cir. 1955), while both majority and minority referred to *Morgenstern*, the decision was that a motion to compel arbitration "is not an application for injunctive relief." This likewise was the holding in *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc.*, 232 F. 2d 366 (D. C. Cir. 1956), which did not mention *Morgenstern*. *Spruill* v. *Cage*, 262 F. 2d 355 (6th Cir. 1958), held denial of a defendant's motion, styled as one for summary judgment but held to be rather a motion to dismiss, in an action for a declaration of rights, was not a final decision appealable under §1291; the opinion does not mention §1292(a)(1); *Morgenstern* was included in a string citation along with 2d Circuit authority. *Brandt* v. *Renfield Importers, Ltd.*, 269 F. 2d 14 (8th Cir. 1959), involved the same dismissal-of-one-of-multiple-defendants problem as the 2d Circuit cases discussed in our opinion, pp. 697-98; no reference was made to *Morgenstern*. This leaves *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 187 F. 2d 65 (7th Cir. 1950), *cert. dismissed per stipulation*, 342 U. S. 802 (1951). We have not examined the state cases, since the entire statutory and decisional background would have to be thoroughly explored and we do not deem this warranted on a question of federal appellate jurisdiction.

ceived such thorough consideration from distinguished members of this Court,—particularly since the consequences predicted in the dissent in the first *Loshin* case had in no way materialized.[4]

Moreover, as pointed out in our opinion, the issue here was not that on which this Court and the Third Circuit have disagreed but one where we deem the case for appealability to be stronger. Is a district judge's dismissal of a count of a complaint for an injunction resting on a claim of violation of a Federal statute separate from any other claim to be denied recognition as a "refusal" of an injunction because some day the same or another judge might or might not grant an injunction on another count raising wholly distinct legal questions? To us a negative answer seems obvious; we think this would have been clear to everyone if the stockholders' suit had been all that stood between the New Haven and the $10,000,000 expenditure sought to be prevented and plaintiffs had pressed the allegation of Interstate Commerce Act violation as the only one sufficiently strong to afford a prospect of temporary relief. Indeed, we gather our brother Clark would agree that an order denying such a temporary injunction would have been appealable under §1292(a)(1). But, as pointed out by Judge Frank in *Federal Glass Co.* v. *Loshin*, 217 F. 2d at 938, a rule differentiating as to appealability between temporary and final injunctions would be "sheer ritualism."[5]

It is not surprising, therefore, that the differences of opinion in this Circuit as to appealability of the denial of summary judgment in an action for an injunction had not

4 Neither Chief Judge Lumbard nor I recalls a single appeal of this sort at the present Term.

5 We would suppose also that denial of a temporary injunction for want of sufficient showing of irreparable injury would be appealable, even if the judge gave plaintiff leave to renew on a more adequate showing, although it could be argued there at least as forcefully as here that the judge had not yet "refused" an injunction.

previously spilled over to the problem here presented. In *Telechron, Inc.* v. *Parissi*, 197 F. 2d 757 (2d Cir. 1952), a unanimous court (Judges Swan, Clark and Frank) upheld the appealability of an order excising unfair-competition language from a complaint for an injunction which also alleged a federal claim.[6] We are now told this decision is not apposite; but the asserted reason, that the excised claim was far apart from the one remaining, seems unrelated to the issue. Surely we are not to read §1292(a)(1) as if it said "refusing an injunction, unless some ground for injunction remains, unless that ground is far apart."

Neither the persuasiveness nor the authority of the decisions in *Loshin* and *Telechron* is in any way challenged by the four cases which are cited as establishing that merely interlocutory rulings of an equity judge advancing a case on his calendar may not properly be considered as either the grant or the denial of an injunction. We are in full accord with this proposition, but its very statement suffices to show how far it and the cases relied on are from the issue here. Three elements are required for appealability under §1292(a)(1) as here applied: (1) The order must be "interlocutory"; (2) it must "refuse"; and (3) what is refused must be an "injunction." Our question, like *Raylite*, *Loshin* and *Telechron*, related to the second element; the cases cited concerned the third. *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283*, 269 F. 2d 618 (2d Cir. 1959) and *Greenstein* v. *National Shirt & Sportswear Assn.*, 2d Cir., January 28, 1960, applied the rule, laid down by the Supreme Court in *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955), that an order granting or denying a stay of an action pending arbitration would be deemed an "injunction" only if the action sought to be stayed would

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6. A footnote (p. 759) cites "* * * *Raylite Electric Corp.* v. *Noma Electric Corp.*, 2 Cir. 170 F. 2d 914, 915. Cf. *Morgenstern Chemical Corp.* v. *Schering Corp.*, 3 Cir., 181 F. 2d 100."

have been an action at law before the fusion of law and equity. *Fleischer* v. *Phillips*, 264 F. 2d 515 (2d Cir. 1959), *cert. denied*, 359 U. S. 1002 (1959), followed in *Marco* v. *Dulles*, 268 F. 2d 192 (2d Cir. 1959), related to orders refusing to disqualify an attorney. The important question discussed and decided was whether the orders were within the class appealable as final under 28 U. S. C. §1291 pursuant to *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). So far as concerns §1292(a)(1), the ruling was merely that (p. 156) "The real and only bite to each motion is the attempt to secure the exclusion of the lawyers from the case; and once disqualification is obtained, all else is superfluous. Hence the prayers for injunctive relief add nothing to the orders denying the motions and render neither of them automatically appealable under §1292(a)(1)." In other words, an "injunction" had not been refused.[7]

We do not assert our reading of §1292(a)(1) is the only possible one. However, we think this comports best not only with the language of the statute, but also with its reason and its history. Orders refusing injunctions are important orders—important not only to the litigants but often, as here, to the public. The need for prompt review arises from the very nature of an injunction, a remedy whose grant or refusal may result in an injury beyond possibility of repair. Congress recognized this when it subjected to review not only interlocutory orders "grant-

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7 Judge Clark also cites the cases, fully considered in our original opinion (pp. 697-98), where the Court has dismissed appeals that were argued to be properly before it as from final judgments under 28 U. S. C. §1291 and no contention was made with respect to appealability under 28 U. S. C. §1292(a)(1). Apart from other factors distinguishing most of these cases, it has been clear since Chief Justice Marshall's statement in *United States* v. *More*, 7 U. S. (3 Cranch) 159, 172 (1805), that courts do not consider themselves bound by the exercise of jurisdiction where "no question was made" and the issue "passed *sub silentio*,"—*a fortiori* by the failure to exercise it.

ing" or "refusing" injunctions but orders "continuing" or "modifying" them. To say that nothing was determined by Judge McGohey's order denying the stockholder's claim of Interstate Commerce Act violation seems to us legal theorizing unrelated to the facts. To be sure, the District Judge might have required the stockholders to present all their counts relating to the challenged transaction at one time but, for entirely sufficient reasons, he did not do so. We assure our brother Clark that, having long practiced in New York, we have no desire to see 28 U. S. C. §1292 modified, either by legislation or by interpretation, to parallel the provisions as to appeal from non-final orders contained in §609 of the New York Civil Practice Act—or to come near that. But §1292 is as much a part of the Judicial Code as §1291; the provision, now in §1292(a)(1), with which we are here concerned, was enacted in 1895, 28 Stat. 666, because the implications of "the lack of all review over the action of a single judge in denying interlocutory injunctions" "had not been adequately considered" in the Evarts Act of 1891, 26 Stat. 826, Frankfurter and Landis, *The Business of the Supreme Court*, 108-09; after limiting the section to the grant or continuing of an injunction in 1900, 31 Stat. 660, Congress restored its former breadth in §129 of the Judicial Code of 1911, 36 Stat. 1134; and the need for still further expansion of appeals from interlocutory orders was demonstrated by the enactment of §1292 (b) in 1958, 72 Stat. 1770. It is not for us to put personal predilections on appealability above the Congressional will.[8]

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8 We see no occasion to discuss our brother Clark's observations in footnote 9 with respect to the unanimous action taken on January 18, 1960, in *Goldlawr* v. *Heiman*, 273 F. 2d 729, except to say that we are unable to follow the distinction of the Supreme Court cases there cited on the ground that they related to final judgments, since the defect in them as in *Goldlawr* was lack of appellate jurisdiction. We therefore cannot agree that an appellate court lacks power to preserve the substantial rights of the parties when an appeal has been taken to the wrong court by excusable error.

Chief Judge Lumbard joins in this opinion. Judge Moore, not having participated in the decision, deems it inappropriate that he comment as to the merits; however, he joins us in considering that an *en banc* should not have been granted here and also in regretting inauguration of a practice of writing opinions with respect to an *en banc* vote.

FILE COPY

FILED
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 742

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,

—v.—

HELENE GLENMORE, CELIA SCHREIBER, DOROTHY HENESSY, MARTIN KOLBRENER, ISADORE BLAU,
and
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondents.

Misc. No. 813

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,

—v.—

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,
Respondent.

BRIEF OF RESPONDENTS-STOCKHOLDERS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI OR MANDAMUS

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IN THE

Supreme Court of the United States

October Term, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION,

Petitioner,

—v.—

HELENE GLENMORE, CELIA SCHREIBER, DOROTHY HENESSY, MARTIN KOLBRENER, ISADORE BLAU,

and

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondents.

TRI-CONTINENTAL FINANCIAL CORPORATION,

Petitioner,

—v.—

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondent.

BRIEF OF RESPONDENTS-STOCKHOLDERS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI OR MANDAMUS

Respondents, who were plaintiffs-appellants below, are stockholders of defendant-respondent New York, New Haven & Hartford Railroad Company ("New Haven"). They submit this brief in opposition to the petitions of Tri-Continental Financial Corporation ("petitioner"), defen-

dant-appellee below, for a writ of certiorari or a writ of mandamus.

Statement of the Case

For purposes of these petitions, we accept the factual portions of petitioner's statement of the case, except for the following omissions:

1. The District Court's decision, which disposed jointly of the motions in the Government's case (No. 741) and in ours, held:

> "All parties agree and I independently find that no genuine issue as to any material fact is raised on any of the motions. Decision of each turns solely on the following question of law: whether [the put agreement] is illegal and void because it lacks prior authorization by the Commission pursuant to Section 20a of the Interstate Commerce Act." (Pet. A-2).

2. The facts and evidence bearing on that single dispositive question of law were necessarily the same in the Government's case and in ours.

3. The complete facts and evidence bearing on that question were placed before the Court of Appeals through the Government's appeal in its case.

4. On that appeal, the present respondents submitted an *amicus* brief, and the banking group, including petitioner, were permitted to answer it in a reply brief (Pet. B-19).

5. On the same appeal, the banking group defendants, including petitioner, acquiesced in the quoted finding of the District Court (Pet. C-22).

REASONS FOR DENYING THE WRITS

I

The proceedings in the Court of Appeals were free of prejudicial error.

Petitioner contends that the Court of Appeals did not have before it a record sufficient to support its judgment (Pet. 4-5, 11). We disagree.

The Court of Appeals had before it the affidavits on the motion to dismiss our appeal, which adequately described the complaint. The Court was also entitled to take judicial notice of the record in the companion case brought up by the Government; *Smith* v. *Hall*, 301 U. S. 216, 218-9 (1937); *West Ohio Gas Co.* v. *Public Utilities Com.*, 294 U. S. 63, 70-71 (1935). That record embraced the District Court's decision as well as all the evidence bearing on the sole issue herein, *i.e.*, the invalidity of the put contract under § 20a of the Interstate Commerce Act, 49 U.S.C. § 20a. To require, on top of these data, the filing of our record would merely have duplicated the Government's record, which was already before the Court, and would have been the height of futile formalism.

But even if, *arguendo*, the procedure of the Court below were deemed irregular, petitioner does not allege, let alone show, that it was prejudiced. Petitioner does not claim that, upon the filing of our record in the Court below, it could have offered any new argument not previously advanced in the Government's case. Indeed, had any new argument been available on the strength of our record, petitioner would doubtless have called it to the attention of the

Court below through a motion for reargument. If this Court were now to vacate the decision below in order to permit the formal filing of our record, the Court of Appeals would, after obeying this Court's mandate, have to re-enter its previous decision; and the parties would ultimately find themselves in exactly the same position as today, with nothing achieved but loss of time and a good deal of expense. Writs of certiorari and mandamus are not issued for such idle exercise in procedural technicalities. See 28 U.S.C. § 2111.

Petitioner cites *Stern and Grossman, Supreme Court Practice* (2d Ed., 1954), p. 13, as indicating that the failure to file our record in the Court below may deprive this Court of jurisdiction. However, *Gay* v. *Ruff*, 292 U. S. 25, 30 (1934), holds that "the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." That our appeal was so pending is undisputed.

Illusory also are the difficulties which petitioner envisages from Supreme Court Rule 26(1). The Rule requires the printing of those portions of the record below "necessary for a consideration of the questions presented". The record in the Government's case, which was before the Court of Appeals, is now before this Court in No. 741. No more than that is necessary for this Court's consideration of the questions presented.

II

The Court below properly held the District Court's decision appealable under 28 U.S.C. § 1292(a)(1). That ruling is in accord with the controlling decision of this Court; and it is not in conflict with any decision of any other Court of Appeals.

The Court below held that we were entitled to appeal from the District Court's order as from an interlocutory refusal of an injunction, 28 U.S.C. § 1292(a)(1). Petitioner would find this ruling in conflict with decisions of the Third and Seventh Circuits (Pet. 12, 14-15); and Judge Clark's dissenting opinion cites a medley of additional cases supposedly indicating an "acute condition" of "confusion" regarding the scope of § 1292 (Pet. E-1112 - E-1114).

If the authorities so adduced were as pertinent to this case as they are numerous, the present petition might well offer an opportunity to clarify the alleged contradictions. But actually the differences existing among the Circuits are wholly irrelevant to the case at bar; and the cloud of citations merely obscures their complete lack of pertinence. Whether one adopts the views of the Second, the Third, the Seventh or any other Circuit, the case at bar, as we shall show, falls squarely within § 1292.

As applied to the present facts, § 1292 permits "appeals from • • • Interlocutory orders of district courts • • • refusing • • • injunctions." The first of these statutory conditions, the presence of an interlocutory district court order, was found by the Court below; the dissenting Judges agreed; petitioner agrees (Pet. 12); and we shall, *arguendo*, likewise agree for purposes of this petition.

The remaining questions then are whether what we sought was an "injunction"; and whether the District Court "refused" it. In reading the authorities cited by Judge Clark and by petitioner, it is necessary to bear in mind whether they relate to the first or the second of these questions.

1. Respondents sought an "injunction" within § 1292.

Although, as a rule, one knows a prayer for injunction if one sees it, attempts have been made to broaden the concept of the term "injunction" beyond its conventional meaning. Thus injunctive character has been claimed for demands for a jury trial, applications for a stay, and motions to disqualify an attorney. Many of the authorities cited by petitioner and by Judge Clark have dealt with contentions of this kind.

Thus, *City of Morgantown* v. *Royal Insurance Co., Ltd.*, 337 U. S. 254 (1949), held that an order striking a demand for jury trial was not appealable as the refusal of an "injunction."

Baltimore Contractors, Inc. v. *Bodinger*, 348 U. S. 176 (1955), *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283*, 269 F. 2d 618 (Cir. 2, 1959), and *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc.*, 232 F. 2d 366, 369 (Cir. D. C., 1956), held that an order granting or denying a stay of an equity action pending arbitration did not involve the grant or refusal of "injunctive" relief. See also *Greenstein* v. *National Skirt & Sportswear Ass'n*, 274 F. 2d 430 (Cir. 2, 1960).

American Airlines v. *Forman*, 204 F. 2d 230 (Cir. 3, 1953), held that the denial of a motion to dismiss for lack of jurisdiction the complaint in an ordinary damage action was not appealable as the denial of an "injunction".

Finally, *Marco* v. *Dulles*, 268 F. 2d 192 (Cir. 2, 1959), and *Fleischer* v. *Phillips*, 264 F. 2d 515 (Cir. 2, 1959), cert. den. *Fleischer* v. *Benjamin*, 359 U. S. 1002, held that an order refusing to disqualify the attorney for another party was not the denial of an "injunction."

Plainly all these cases are wholly inapposite to that at bar. It is undisputed that the sixth count of our complaint and our motion for judgment thereon did seek a genuine injunction in the conventional sense. The foregoing authorities, which merely refused to extend the term "injunction" to marginal and extraordinary situations, are, therefore, beside the point.

We turn to the question whether the District Court "refused" an injunction. Its decision was twofold: (a) It granted summary judgment dismissing the sixth count of the complaint; and (b) it denied our motion for summary judgment on that count. In either aspect, we submit, the decision constituted the interlocutory "refusal" of an injunction within § 1292.

2. The grant of summary judgment dismissing the sixth count was the "refusal" of an injunction under § 1292.

A long and unbroken line of authorities holds that the interlocutory dismissal of a claim for injunctive relief is appealable under § 1292, even though other aspects of the claim or related claims or counterclaims remain pending in the District Court.

General Electric Co. v. *Marvel Rare Metals Co.*, 287 U. S. 430 (1932);
George P. Converse & Co., Inc. v. *Polaroid Corporation*, 242 F. 2d 116 (Cir. 1, 1957);
Telechron, Inc. v. *Parissi*, 197 F. 2d 757 (Cir. 2, 1952);
Cutting Room Appliances Corp. v. *Empire Cutting M. Co., Inc.*, 186 F. 2d 997 (Cir. 2, 1951);
Simmonds Aerocessories, Limited v. *Elastic Stop Nut Corporation of America*, 257 F. 2d 485, 489 (Cir. 3, 1958);
Hook v. *Hook & Ackerman, Inc.*, 233 F. 2d 180, 182 (Cir. 3, 1956), cert. den. 352 U. S. 960.

The rule of these cases applies squarely to the case at bar. Under that rule, the dismissal of the sixth count was the refusal of an injunction. The continued pendency in the District Court of claims attacking the put contract on other grounds prevented the dismissal of the sixth count from being a "final decision"; it did not prevent that dismissal from being an interlocutory order appealable under § 1292.

Petitioner contends that this conclusion is in conflict with decisions from the Third and Seventh Circuits (Pet. 14-15); but there is no such conflict.

(a) The Third Circuit cases.

Petitioner invokes (Pet. 14) the following Third Circuit cases: *Morgenstern Chemical Co., Inc.* v. *Schering Corporation*, 181 F. 2d 160 (Cir. 3, 1950); *Albert* v. *School District*, 181 F. 2d 690 (Cir. 3, 1950); *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122 (Cir. 3, 1954). They are inapposite since none of them involved the dismissal of a claim for injunctive relief. In later decisions, however—ignored by

petitioner as well as by Judge Clark—the Third Circuit squarely held that the interlocutory dismissal of a claim for an injunction does constitute the refusal of an injunction within § 1292; *Simmonds Aerocessories, supra* (257 F. 2d, at 489); *Hook, supra* (233 F. 2d, at 182). Thus the pretended conflict between the decision below and those of the Third Circuit is non-existent.

The Third Circuit did hold that the *denial* of summary judgment for an injunction because of the presence of fact issues is not appealable, inasmuch as such denial does not have "a final and irreparable effect on the rights of the parties" (*Morgenstern*, 181 F. 2d, at 162). But in the present case the District Court *granted* summary judgment dismissing our injunction claim. The Second and Third Circuits are in complete agreement that such an interlocutory *grant* of summary judgment is appealable under § 1292.

(b) The Seventh Circuit case.

Petitioner cites (Pet. 12, 15) *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 187 F. 2d 65 (Cir. 7, 1950), cert. granted 341 U. S. 930, dism. by stip. 342 U. S. 802, as being in conflict with the decision below. *Packard* was a suit for patent infringement and unfair competition; the defendant counterclaimed for declaratory relief and for an injunction based on alleged anti-trust violations. The District Court dismissed so much of the counterclaim as related to the anti-trust violations. Upon the defendant's appeal, the Seventh Circuit conceded that, prior to the adoption of Rule 54(b) F.R.C.P., the decision would have been appealable as an interlocutory refusal of an injunction under § 1292; but it dismissed the appeal because of the defendant's failure to obtain from the District Court a determi-

nation under Rule 54(b). We need not stop to consider whether the court was right in requiring such a determination for an interlocutory appeal*; for in the case at bar the District Court did make the determination under Rule 54(b) (Pet. A-10). It follows that our appeal was properly taken, whether the *Packard* doctrine be accepted or rejected. The differences between the Seventh and the other Circuits concerning the *Packard* doctrine are, therefore, immaterial to the case at bar.

(c) Other Circuit cases.

Petitioner and the dissenting Judges below round out their arguments by the indiscriminate citation of cases which have simply nothing to do with § 1292.

In *Schwartz* v. *Eaton*, 264 F. 2d 195 (Cir. 2, 1959); *John & Sal's A. S. Inc.* v. *Jones Beach S. P. A.*, 267 F. 2d 862 (Cir. 2, 1959); *Goldlawr, Inc.* v. *Heiman*, 273 F. 2d 729 (Cir. 2, 1959); *Gauvreau* v. *United States Pictures, Inc.*, 267 F. 2d 861 (Cir. 2, 1959); *Cott Beverage Corp.* v. *Canada Dry Ginger Ale*, 243 F. 2d 795 (Cir. 2, 1957); and *Brandt* v. *Renfield Importers, Ltd.*, 269 F. 2d 14 (Cir. 8, 1959), the appellants sought to sustain appealability as from a final judgment under 28 U.S.C. § 1291; as the Court below pointed out (Pet. B-19), neither the briefs nor the opinions in those cases discussed appealability as from the denial of an injunction under § 1292. The cases thus do not touch on the issue here involved.

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* The other Circuits have expressly rejected *Packard's* requirement of such a determination in case of interlocutory appeals. *George P. Converse, supra* (Cir. 1, 242 F. 2d, at 119); *Meyer* v. *Indian Hill Farm, Inc.*, 258 F. 2d 287, 290 (Cir. 2, 1958); *Hook, supra* (Cir. 3, 233 F. 2d, at 182; cert. den. 352 U. S. 960); *Pang-Tsu Mow* v. *Republic of China*, 201 F. 2d 195, 197-8 (Cir. D. C., 1952), cert. den. 345 U. S. 925.

Spruill v. *Cage*, 262 F. 2d 355 (Cir. 6, 1958), and *Wallace Products, Inc.* v. *Falco Products*, 242 F. 2d 958 (Cir. 3, 1957), involved not even a pretended claim for an injunction; neither case mentions § 1292. And, similarly, the claim dismissed in *District 65* v. *McKague*, 216 F. 2d 153 (Cir. 3, 1954), did not purport to seek injunctive relief and was, therefore, beyond the scope of § 1292.

We submit, therefore, that the District Court's summary dismissal of our sixth count was appealable under § 1292; and in so holding, the decision below is in accord with *all* the authorities, including those from this Court and from the Third and Seventh Circuits.

3. The denial of respondents' motion for summary judgment on the sixth count was likewise the "refusal" of an injunction under § 1292.

Since the *dismissal* of the sixth count gave us a clear right of appeal under § 1292, it is not too important whether the *denial of our motion for summary judgment* gave us the same right. Out of precaution, we briefly show that it did.

The Second, Fifth and Ninth Circuits hold that the denial of summary judgment for an injunction is appealable under § 1292, no matter whether the motion is denied as a matter of law or because of the presence of issues of fact.

Raylite Electric Corp. v. *Noma Electric Corp.*, 170 F. 2d 914, 915 (Cir. 2, 1948);

Federal Glass Co. v. *Loshin*, 217 F. 2d 936 (Cir. 2, 1954); 224 F. 2d 100 (Cir. 2, 1955);

International Forwarding Co. v. *Brewer*, 181 F. 2d 49 (Cir. 5, 1950);

Talon, Inc. v. *Union Slide Fasteners, Inc.*, 249 F. 2d 308 (Cir. 9, 1957).

On the other hand, the Third Circuit and the District of Columbia draw a distinction: If summary judgment for an injunction is denied because of the presence of fact issues, the order is not appealable; but if summary judgment is denied as a matter of law, the unsuccessful applicant may appeal under § 1292. Professor Moore favors this view.

Morgenstern, supra (Cir. 3, 181 F. 2d 160);
Hook, supra (Cir. 3, 213 F. 2d 122, 128);
Division 689 v. *Capital Transit Company*, 227 F. 2d 19 (Cir. D. C., 1955);
6 *Moore's Fed. Pr.* (2d ed., 1953), § 54.07, p. 51; § 56.21 (2), pp. 2321-2;
Comment, 7 Stanford L. Rev. 549, 554-5 (1955).

The rationale for this distinction is discussed in the footnote.*

The present case offers no opportunity for choosing between these conflicting views. For here the District Court expressly negated the presence of any issue of fact (Pet. A-2); it denied our motion for summary judgment as a matter of law. In consequence, its decision was appealable,

* *Morgenstern* held that the denial of summary judgment on account of the presence of fact issues is not appealable because the effect of such a decision "is merely to require the submission of additional evidence" and is "not greatly different from an order continuing a cause already calendared for trial until some future date in order that additional witnesses may be called" (181 F. 2d. at 162). This rationale, of course, does not fit an order denying summary judgment as a matter of law; for no amount of additional evidence can cure a claim which lacks legal foundation.

In *Division 689, supra*, the court's majority dismissed the appeal only because the denial of summary judgment reflected "no more than a ruling that a genuine issue of material fact remains to be tried" (227 F. 2d. at 20). Judge Danaher, while accepting the *Morgenstern* doctrine, dissented because he read the District Court's decision as ruling "that the plaintiff was not entitled to prevail as a matter of law" (227 F. 2d, at 21).

no matter whether one adopts the doctrine of *Raylite* and *Loshin* or that of *Morgenstern, Hook* and *Division 689*. On either theory, the decision below was correct. This Court will not grant certiorari to resolve a question which is not presented by the facts of this case.

4. The continued pendency in the District Court of related aspects of the claim does not prevent an appeal under § 1292.

The dissenting Judges below advanced yet another argument against appealability: Our complaint attacks the put contract for violating not only the Interstate Commerce Act (count 6), but also the Investment Company Act (count 5) and the New Haven's charter (count 7). The three counts allege but a single claim; and the continued pendency of that claim in the District Court is said to prevent appealability.

The argument is unsupported by any authority; and it is contrary at least to the Third Circuit's decision in *Simmonds Aerocessories, supra* (257 F. 2d, at 489).*

We may assume that counts 5, 6 and 7 allege a single claim which continued pending in the District Court after its decision. If it were otherwise, the dismissal of count 6 would have been a "final decision" appealable under § 1291 and Rule 54(b). The fact that the claim was "single" rendered the dismissal of count 6 "interlocutory." For that

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* In *Simmonds Aerocessories*, one count of the complaint sought an injunction; the other, based on the same facts, sought damages. The plaintiffs' appeal from the dismissal of the first count was sustained under both § 1291 and § 1292 (257 F. 2d, at 489):

> "Moreover, since the first count sought an injunction which was denied by its dismissal, the judgment would be appealable even if it were merely interlocutory. 28 U. S. C. § 1292(1)."

very reason § 1292 became applicable. It is the essence of an interlocutory decision that it does not dispose of the claim as such. The dissenting Judges would hold that the same ground which made § 1292 applicable prevented its application.

The possible renewal of our motion for an injunction on some fact basis other than the lack of ICC approval does not, as the dissenting judges stated (Pet. B-22, E-1114), militate against the present appeal. Since an interlocutory order is, by definition, not final, *any* interlocutory application, although initially unsuccessful, can be repeated and re-repeated on a stronger or different showing of facts; and each decision thereon, if it is the grant or denial of an injunction, can be appealed under § 1292. The possibility of a "plethora" of interlocutory appeals is, therefore, always present. If that be deemed a drawback, the Congress accepted it in enacting § 1292, and this policy binds the Courts.

The Court below, we submit, followed established precedents and policy in entertaining the appeal. Its ruling affords no ground for the grant of certiorari.

III

The decision below on the merits is sound and in accord with administrative practice. The facts of the case are too unique to warrant review by this Court.

1. The case is too unique to warrant review by this Court.

During the 38 years § 20a of the Interstate Commerce Act has been on the books, no case even remotely comparable to that at bar has come before the Commission or the courts; and as many years may go by before anything

similar may recur. The Court below held the case to be "one of first impression" (Pet. C-8); and petitioner concedes that the decisions below are the first to construe § 20a(2) with reference to the questions here raised (Pet. 17). The issues may be of importance to the parties; but the very uniqueness of the facts strips the case of that general interest which might justify review by this Court.

2. The alleged "banking nature" of the transaction is contrary to fact and, in any event, irrelevant to the application of § 20a(2).

The New Haven's contract with the banking group, as amended on April 17/18, 1956 (Gov. App. 23a-27a),* gave the banking group an option or "put" to sell 131,385 shares of the New Haven's preferred stock to the New Haven at $75 per share, a price $15 in excess of the banking group's cost; the put was exercisable 3½ years later, *i.e.*, between November 18 and December 18, *1959*. The New Haven's option or "call" to buy the shares from the banking group at the same price was exercisable within eight months, *i.e.*, between November 18 and December 18, *1956*.** After December 18, 1956, the banking group was free to sell the shares as it liked, without being accountable to the New Haven (Gov. App. 24a).

Petitioner calls this a "banking transaction", guaranteeing to the banking group a reasonable but limited "banking

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* The Appendix filed by the Government with the Court of Appeals is referred to as "Gov. App.". It is before this Court in No. 741.

** The call was practically meaningless since the New Haven, having just borrowed $16,000,000 from the Government for the repair of flood damages (Pet. C-3, C-5), was in no position to spend almost $10,000,000 within the next eight months for the purchase of its own shares.

profit", secured by the shares as "collateral" (Pet. 6, 18). It was, of course, nothing of the kind. To be sure, the group was guaranteed a minimum profit of $15 a share. But if the New Haven failed to exercise its call on or before December 18, 1956 and the market price of the stock thereafter rose above 75, the group could sell the shares at the higher price and keep the entire profit. Its chance of profit was thus unlimited; and it held the shares not as "collateral", but as owner.

Whether such an extraordinary deal may be called a "banking transaction" is irrelevant to the application of § 20a(2). The scope of the statute is defined by its terms; it allows no exemption for "banking transactions". It is undisputed that the issuance of negotiable instruments by a carrier falls within § 20a(2); *Lehigh Valley R.R. Conditional Sales Contract*, 233 I.C.C. 359, 365; see Pet. 20-21. Such issuance might often be part of a "banking transaction"; but the use of that label cannot defeat the application of the statute.

3. Petitioner wrongly ascribes to the Court below the use of an "economic test" for the application of § 20a(2).

Petitioner's main argument is that the Court below determined the applicability of § 20a(2) by the "hindsight and chancellor's foot test" of the "economic effect" which the agreement produced four years after it was made (Pet. 18-21). It is the use of this "unworkable test" which supposedly causes "widespread concern to banks, financial institutions and others" (Pet. 17).

It is petitioner who has fabricated the obnoxious test which it would impute to the Court of Appeals. The actual

basis of the decision below, in briefest summary, was this: § 20a(2) makes it "unlawful for any carrier to issue any share of capital stock * * * unless and until * * * the Commission by order authorizes such issue". The preferred shares of the New Haven were, of course, "shares of capital stock". Under settled ICC practice, an amendment of the terms of such shares is just as much an "issue" thereof within § 20a(2) as is the original issuance of stock (Pet. C-9, footnotes 4, 5, 6); under the same practice, it makes no difference that the amendment here, which gave the contracting stockholders the right to have their shares redeemed at a fixed price, was contained in a separate agreement rather than being stamped on the stock certificates (Pet. C-12, footnote 9). The Court's conclusion that the put agreement fell within § 20a(2) was thus predicated upon careful analysis of the language of the statute in the light of its "remedial purposes" evidenced by the legislative history (Pet. C-11),* and upon a painstaking review of the Commission's administrative practice.

Only after reaching its conclusion by these traditional methods of statutory interpretation did the Court point out that the result, far from being the product of dogmatic legalism, was in accord with the "highly practical tests of the marketplace"; under these tests, an agreement capable of producing an "economic effect" as far-reaching as that of the put contract here involved will indeed be viewed as modifying the shares of stock affected (Pet. C-11).

It was certainly legitimate for the Court to fortify its legal conclusions by showing that they were in harmony

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*For the legislative history of § 20a, see also *New York C. & St. L. R. Co. v. Frank*, 314 U. S. 360, 387 (1941, diss. op.).

with a practical business view. But to ascribe to the Court, as does petitioner, a test of statutory invalidity which would turn on the "economic effect" of the transaction is a gross perversion of the decision below.

4. The decision below is in accord with the ICC's practice in administering § 20a(2).

Petitioner would read the decision below as "riding roughshod over the ICC's 40 years of settled construction of § 20a(2)" (Pet. 17). To substantiate this charge, petitioner points to the ICC's practice of accepting or declining jurisdiction under § 20a(2) "regardless of the transactions' financial significance" (Pet. 19). But as we have shown, the Court below never adopted the preposterous test of "economic effect" and "financial significance" which petitioner would read into its opinion. The pretended conflict between the Court's decision and the ICC's practice is, therefore, imaginary.

The Court below, as we have said, took pains to conform its decision to the ICC's practice. It gave explicit attention to most of the ICC cases now cited by petitioner (Pet. 19-20). The gist of those cases is that § 20a(2) applies only to "instruments negotiable or quasi-negotiable in character, such as are issued for the purpose of railroad financing"; *Lehigh Valley R.R. Conditional Sales Contract*, 233 I.C.C. 359, 365 (1939); see Pet. 21. Since conditional sales contracts,* open book indebtedness,** mort-

* See *Lehigh Valley R.R. Conditional Sales Contract*, 233 I.C.C. 359 (1939); *Application of Louisiana Ry. & Navigation Co.*, 67 I.C.C. 808 (1921).

** *Minneapolis & St. L. R.R. Reorganication*, 244 I.C.C. 357, 366 (1941).

gages,* loans not evidenced by notes or bonds,** etc., are not "instruments negotiable or quasi-negotiable in character", the ICC properly held that they are not "evidences of indebtedness" within § 20a(2); and the Court below agreed (Pet. C-13). By contrast, however, the New Haven shares, which were the subject of the put contract, were unquestionably negotiable or quasi-negotiable instruments. To be sure, the put contract itself was not a negotiable instrument; but it amended the terms of the preferred shares which were negotiable; and that, as we have shown (*supra*, p. 17), is enough for the application of § 20a(2).

5. The ICC's procedural delay affords petitioner no defense in this action.

Petitioner finally states that officers of the New Haven secured informal "clearance" of the put contract from two officials of the ICC, and that the ICC thereafter remained inactive for three years. Petitioner urges this Court to review the question of the extent to which it could rely on these matters (Pet. 22-23).

In the lower courts petitioner expressly disclaimed any contention that these facts resulted in "authorization" of the put contract by the ICC, or that they estopped the ICC from challenging the agreement as illegal (Pet. A-7). Petitioner merely argued that the ICC's failure to take action for three years constituted a practical construction by it

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* *Missouri Southern R.R. Bonds*, 230 I.C.C. 49 (1938); *Illinois Terminal R.R.*, 221 I.C.C. 676, 679 (1937).

** *Davidson Transfer & Storage Co. First Mortgage*, 282 I.C.C. 521 (1952).

of § 20a(2), which a court should not disregard (*ibid.*). This Court has already given the answer: "The failure of the Commission to act is not a binding administrative interpretation"; *United States* v. *DuPont*, 353 U. S. 586, 590 (1957); *Baltimore & O. R. Company* v. *Jackson*, 353 U. S. 325, 330-1 (1957); see Pet. C-15 - C-17.

Petitioner's alleged reliance on "clearance" of the contract with ICC officials is contrary to the record. The original put contract was made on November 10, 1955 (Pet. 6). Although ICC approval, if required, had to be given *in advance* (§ 20a(11)),* the conference at which the New Haven officers reported the contract to two ICC officials did not take place until November 29, 1955 (Pet. A-5). No representative of the banking group attended the conference; and the two ICC officials by no means indicated that they considered ICC approval unnecessary (Pet. A-5 - A-6; Gov. App. 81a-84a). There was thus neither "clearance" by any ICC official nor "reliance" by petitioner or any other member of the banking group.

Finally, it is not true that petitioner remained unaware of the invalidity of the put contract for three years. The invalidity was asserted as early as August 6, 1956 when Dorothy Henessy, one of the plaintiffs herein, filed her complaint in this action; that complaint (par. 16) expressly alleged that the put contract was unlawful for lack of ICC

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*The full text of § 20a(11) appears in Pet. D-2. It provides, in pertinent part:

"Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, * * *."

approval.* Petitioner thus received warning less than four months after the date of the amended put contract and had ample time to protect itself if it so desired.

CONCLUSION

It is respectfully submitted that the applications for a writ of certiorari or a writ of mandamus should be denied.

Respectfully submitted,

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April 12, 1960.

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* The District Court's statement that the charge of illegality under the Interstate Commerce Act was first made by the amended complaint filed on June 11, 1957 (Pet. A-7) is "clearly erroneous." Rule 52(a), since it overlooks the Henessy complaint.

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No. 742 and No. 813, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION, PETITIONER

v.

HELEN GLENMORE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This case is related to No. 741 and No. 812, Misc., in which the United States is filing simultaneously its brief in opposition. It involves the sixth count in a stockholders' derivative suit that challenged, as violating Section 20a of the Interstate Commerce Act, the same contract that was similarly challenged in the Government's suit that is involved in No. 741 and No. 812, Misc.

Under the contract, the New York, New Haven and Hartford Railroad ("New Haven") made a contingent commitment with a group of bankers, including petitioner, to repurchase 131,385 shares of its preferred stock from the banking group. The theory of both

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the Government's suit and the sixth count in the stockholder's suit is that the repurchase agreement constituted an issuance or modification of securities, for which Section 20a requires prior approval of the Interstate Commerce Commission; and that since such approval was not obtained, the agreement is unlawful.

The district court dismissed both the Government's complaint and the sixth count, holding that the contract was not covered by Section 20a. Both the United States and the stockholders appealed. The court of appeals decided the Government's appeal first, and held that Section 20a required prior Commission approval of the agreement. Subsequently, however, the court held that it had had no jurisdiction on the Government's appeal to decide that question, since it concluded that appeal in the Government's suit did not lie to it, but lay directly to this Court. At the same time, however, "for the reasons fully set forth" in its earlier opinion in the Government's appeal, the court of appeals reversed the judgment of the district court dismissing the sixth count of the stockholders' suit. The instant petition and motion for leave to file petition for mandamus or other appropriate writ seek review of the latter action.

The effect of the decision below in the instant case is to provide the same relief sought in the Government's suit, namely, a determination that the contract is illegal and the issuance of an injunction against its performance. Thus, the practical effect of the decision below in this case will be to render moot the Government's case.

The Government is filing this memorandum to comment briefly on petitioner's contention (Pet. 23), previously rejected by the court of appeals (Pet. App. C–6, C–21), that there has been "[i]nformal * * * clearance" of the transaction by the Commission. The argument rests on the statement (Pet. 22) that, ~~prior to~~ after entering into the agreement, the New Haven's counsel and its treasurer had a conference with a commissioner and a Commission official at which "[t]he making of the challenged agreement * * * was fully disclosed to these Commission officials and copies of the agreement were given to them," and they were "informed, moreover, that New Haven's counsel was of the opinion that the agreement was not within the purview of Section 20a and that accordingly New Haven did not propose to apply for Commission approval pursuant to that Section."

The fact of the matter is, however, as the court of appeals held (Pet. App. C–6) and as petitioner concedes (Pet. 7), that at no time did the New Haven seek Commission approval of the proposed transaction. Once it is established (as the court of appeals correctly held) that the transaction is covered by Section 20a and therefore requires prior Commission approval, nothing less than a formal application and formal Commission approval will suffice to validate the transaction. Section 20a specifically so provides. It states (Pet. App. D–1, emphasis added):

> It shall be unlawful for any carrier to issue any share of capital stock * * * unless and until, and then only to the extent that, *upon application by the carrier,* and after investi-

> gation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof * * * the Commission *by order* authorizes such issue * * *.

Nothing in the statute sanctions the substitution of "informal consultation and clearance" for the formal filing, investigation and approval by order that the Act prescribes as the method by which Commission approval may be obtained for transactions covered by Section 20a. As this Court pointed out, in rejecting a similar claim that the alleged "knowledge or acquiescence of officers of the Federal Government" constituted a defense to a charge of illegal price-fixing under the Sherman Act, "Congress had specified the precise manner and method of securing immunity" and "[n]one other would suffice" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225–227). Moreover, as the court of appeals indicated (Pet. App. C–17–18), the parties could have quickly obtained from the Commission a ruling whether the transaction was subject to Section 20a. They could either have had the New Haven "apply under §20a for approval of the agreement while at the same time moving to dismiss the application for want of jurisdiction" (a settled Commission practice for determining jurisdiction), or themselves have sought a declaratory order from the agency.

Had a formal application been filed for Commission approval under Section 20a, the agency would have been required by that section to investigate the "purposes and uses of the proposed issue and the proceeds thereof." And, before approving the trans-

action, the Commission would have had to find that the transaction was "compatible with the public interest," that it is "necessary or appropriate for or consistent with the proper performance by the carrier of service to the public * * * and * * * will not impair its ability to perform that service," and that it is "reasonably necessary and appropriate for such purpose" (Pet. App. D-2).

In determining these questions, the Commission could have considered the contention (Pet. 6–7) that "the transaction was in essence a banking-transaction whereby the Banking Group made its capital, to the extent of approximately $7,800,000, available to the New Haven" to enable the latter to eliminate a block of stock held by the Dumaine interests, which allegedly were preventing the New Haven from obtaining a bank loan necessary to repair flood damage to the carrier. The Dumaine group had been ousted from the management in a proxy contest in 1954 (R. 78a), and it had refused to vote its large minority holdings to authorize a bank loan unless dividends on the common stock would be withheld until the loan was repaid (Pet. 6–7). The Commission could have considered whether the stock-repurchase agreement was "compatible with the public interest" under the standards of Sections 20a, in view of the facts that the New Haven had not paid any dividends on its common stock since at least 1947 (Standard & Poor's, *Trade & Securities Ind.*, supplement dated May 7, 1959, page R. 60) and that the stock holdings of the then management of the New Haven "consist[ed] primarily of Common Stock" (R. 50a).

In other words, in order to make the findings required under Section 20a, the Commission frequently is required to conduct a full-scale inquiry involving numerous aspects of a carrier's transactions and financial position. It was precisely to insure that the Commission would have all the available information that Congress provided that Section 20a approval could not be given "unless and until * * * upon application by the carrier, and after investigation by the Commission * * * the Commission by order authorizes" the transaction. The facts of this case dramatically demonstrate that "[i]nformal consultation and clearance" is not an adequate substitute for the kind of inquiry that Congress intended the Commission to make under Section 20a.

With respect to petitioner's other contentions, the Government is of the view that the decision below on the merits is correct; and that, because of the unique procedural context in which it arises, the question whether the district court's dismissal of the sixth count in the stockholder's suit was reviewable under 28 U.S.C. 1292(a)(1) is not an appropriate one for further review in this case. For these reasons, we believe that the petition for a writ of certiorari in No. 742 and the motion for leave to file petition for mandamus or other relief in No. 813, Misc., should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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